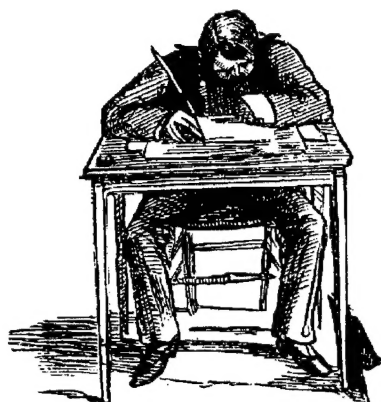


THE ONE HUNDRED FORTY-SIXTH

# Contract Attorneys

COURSE  
(JA 501)



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## Volume II

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***Chapter 18***  
**Inspection, Acceptance,  
& Warranty**



***146th Contract Attorneys Course***

## CHAPTER 18

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## **CHAPTER 18**

### **INSPECTION, ACCEPTANCE, AND WARRANTY**

#### **I. INTRODUCTION.**

A fundamental goal of the acquisition process is to obtain quality goods and services. In furtherance of this goal, the government inspects tendered supplies or services to insure that they conform with contract requirements. While the right to inspect and test is very broad, it is not without limits. Frequently, government inspectors perform unreasonable inspections, rendering the government liable to the contractor for additional costs. Proper inspections are critical, because once the government accepts a product or service, it cannot revoke its acceptance except in narrowly defined circumstances. Attorneys can contribute to the success of the government procurement process by working with government inspectors and contracting officers to insure that each of these individuals understands the government's rights and obligations regarding inspection, acceptance, and warranty under government contracts.

#### **II. FUNDAMENTAL CONCEPTS OF INSPECTION AND TESTING.**

##### **A. General.**

1. The inspection clauses, which are remedy granting clauses, vest the government with significant rights and remedies. FAR 52.246-2 - 52.246-12.
2. In any dispute, the parties must identify the correct theory of recovery and applicable contractual provisions. The theory of recovery normally flows from a contractual provision. See Morton-Thiokol, Inc., ASBCA No. 32629, 90-3 BCA ¶ 23,207 (government denial of cost reimbursement rejected-board noted government's failure to cite Inspection clause).

MAJ John Siemietkowski  
146th Contract Attorneys Course  
April/May 2001

B. Origin of the Government's Right to Inspect. FAR Part 46.

1. The government has the right to inspect to ensure that it receives conforming goods and services. The particular inspection clauses contained in a contract, if any, determine the government's right to inspect a contractor's performance.
2. Contract inspections fall into three general categories, depending on the extent of quality assurance needed by the government for the acquisition involved. These include:
  - a. Government reliance on inspection by the contractor (FAR 46.202-2);
  - b. Standard inspection requirements (FAR 46.202-3); and
  - c. Higher-level contract quality requirements (FAR 46.202-4).
3. The FAR contains several different inspection clauses. In determining which clause to use, consider:
  - a. The contract type (e.g., fixed-price, cost-reimbursement, time-and-materials, and labor-hour); and
  - b. The nature of the item procured (e.g., supply, service, construction, transportation, or research and development).
4. Depending upon the specific clauses in the contract, the government has the right to inspect and test supplies, services, materials furnished, work required by the contract, facilities, and equipment at all places and times, and, in any event, before acceptance. See, e.g., FAR 52.246-2 (supplies-fixed-price), -4 (services-fixed-price), -5 (services-cost-reimbursement), -6 (time-and-materials and labor-hour), -8 (R&D-cost-reimbursement), -9 (R&D), -10 (facilities), and -12 (construction).

C. Operation of the Inspection Clauses.

1. Definitions. FAR 46.101

- a. "Inspection" means examining and testing supplies or services to determine whether they conform to contract requirements.
- b. "Testing" is that element of inspection that determines the properties or elements of products, including the functional operation of supplies or their components, by the application of established scientific principles and procedures.

2. The government may require a contractor to maintain an inspection system that is adequate to ensure delivery of supplies and services that conform to the requirements of the contract. David B. Lilly Co., ASBCA No. 34678, 92-2 BCA ¶ 24,973 (government ordered contractor to submit new inspection plan to eliminate systemic shortcomings in the inspection process).

3. Inspection and testing must reasonably relate to the determination of whether performance is in compliance with contractual requirements.

- a. Contractually specified inspections or tests are presumed reasonable unless they conflict with other contract requirements. General Time Corp., ASBCA No. 22306, 80-1 BCA ¶ 14,393.
- b. If the contract specifies a test, the government may not require a higher level of performance than measured by the method specified. United Technologies Corp., Sikorsky Aircraft Div. v. United States, 27 Fed. Cl. 393 (1992).

- c. The government may use tests other than those specified in the contract provided the tests do not impose a more stringent standard of performance. Donald C. Hubbs, Inc., DOT BCA No. 2012, 90-1 BCA ¶ 22,379 (use of rolling straightedge permitted after initial inspection determined that road was substantially nonconforming); Puroflow Corp., ASBCA No. 36058, 93-3 BCA ¶ 26,191 (board upholds government's rejection of First Article Test Report for contractor's failure to perform an unspecified test).
  
- d. Absent contractually specified tests, the government may use any tests that do not impose different or more stringent standards than those required by the contract. Space Craft, Inc., ASBCA No. 47997, 97-2 BCA ¶ 29,341 (government reasonably measured welds on clamp assemblies); Davey Compressor Co., ASBCA No. 38671, 94-1 BCA ¶ 26,433; Al Johnson Constr. Co., ENG BCA No. 4170, 87-2 BCA ¶ 19,952.
  
- e. If the contract specifies no particular tests, consider the following factors in selecting a test or inspection technique:
  - (1) Consider the intended use of the product or service. A-Nam Cong Ty, ASBCA No. 14200, 70-1 BCA ¶ 8,106 (unreasonable to test coastal water barges on the high seas while fully loaded).
  
  - (2) Measure compliance with contractual requirements, and inform the contractor of the standards it must meet. Service Eng'g Co., ASBCA No. 40275, 94-1 BCA ¶ 26,382 (board refused to impose a military standard on contract for ship repair, where contract simply required workmanship in accordance with "best commercial marine practice"); Tester Corp., ASBCA No. 21312, 78-2 BCA ¶ 13,373, mot. for recon. denied, 79-1 BCA ¶ 13,725.
  
  - (3) Use standard industry tests, if available. DiCecco, Inc., ASBCA No. 11944, 69-2 BCA ¶ 7,821 (use of USDA mushroom standards upheld). But see Chelan Packing Co., ASBCA No. 14419, 72-1 BCA ¶ 9,290 (government inspector failed to apply industry standard properly).

4. The government must inspect and test correctly. Baifield Indus., Div. of A-T-O, Inc., ASBCA No. 13418, 77-1 BCA ¶ 12,308 (cartridge cases/rounds fired at excessive pressure).
5. Generally, the government is not required to perform inspections. Cannon Structures, Inc., AGBCA No. 90-207-1, 93-3 BCA ¶ 26,059.
  - a. The government's failure to discover defects during inspection does not relieve the contractor of the requirement to tender conforming supplies. FAR 52.246-2(c); George Ledford Constr., Inc., ENGBCA No. 6218, 97-2 BCA ¶ 29,172.
  - b. However, the government may not unreasonably deny a contractor's request to perform preliminary or additional testing. Alonso & Carus Iron Works, Inc., ASBCA No. 38312, 90-3 BCA ¶ 23,148 (no liability for defective fuel tank because government refused to allow a preliminary water test not prohibited by the contract); Praoil, S.R.L., ASBCA No. 41499, 94-2 BCA ¶ 26,840 (government unreasonably refused contractor's request, per industry practice, to perform retest of fuel; termination for default overturned).
6. Requiring a contractor to perform tests not specified in the contract may entitle the contractor to an equitable adjustment of the contract price. CBI NA-CON, Inc., ASBCA No. 42268, 93-3 BCA ¶ 26,187.

### III. GOVERNMENT REMEDIES UNDER THE INSPECTION CLAUSE.

#### A. Introduction.

1. The inspection clauses give the government significant remedies.
2. The government's remedies under the inspection clauses operate in two phases. Initially, the government may demand correction of deficiencies. If this proves to be unsuccessful, the government may obtain corrective action from other sources.

3. Under the inspection clauses, the government's remedies depend upon when the contractor delivers nonconforming goods or services.

B. Defective Performance **BEFORE** the Required Delivery Date.

1. If the contractor delivers defective goods or services before the required delivery date, the government may:
  - a. Reject the tendered product or performance. Andrews, Large & Whidden, Inc. and Farmville Mfg. Corp., ASBCA No. 30060, 88-2 BCA ¶ 20,542 (government demand for replacement of non-conforming windows sustained); But see Centric/Jones Constr., IBCA No. 3139, 94-1 BCA ¶ 26,404 (government failed to prove that rejected work was noncompliant with specifications; contractor entitled to equitable adjustment for performing additional tests to secure government acceptance); **AND**
  - b. Require the contractor to correct the nonconforming goods or service, giving the contractor a reasonable opportunity to do so. Premiere Bldg. Servs., Inc., B-255858, Apr. 12, 1994, 94-1 CPD ¶ 252 (government may charge reinspection costs to contractor); or,
  - c. Accept the nonconforming goods or services at a reduced price. Federal Boiler Co., ASBCA No. 40314, 94-1 BCA ¶ 26,381 (change in cost of performance to the contractor, not the damages to the government, is the basis for adjustment); Blount Bros. Corp., ASBCA No. 29862, 88-2 BCA ¶ 20,644 (government entitled to a credit totalling the amount saved by contractor for using nonconforming concrete). See also Valley Asphalt Corp., ASBCA No. 17595, 74-2 BCA ¶ 10,680 (although runway built to wrong elevation, only nominal price reduction allowed because no loss in value to the government).
2. The government may not terminate the contract for default based on the tender of nonconforming goods or services before the required delivery date.



C. Defective Performance ON the Required Delivery Date.

1. If the contractor delivers nonconforming goods or services on the required delivery date, the government may:
  - a. Reject or require correction of the nonconforming goods or services;
  - b. Reduce the contract price and accept the nonconforming product; or
  - c. Terminate for default if performance is not in substantial compliance with the contract requirements. See FAR 52.249-6 to 52.249-10; Deskbook, Ch. 25. When the government terminates a contract for default, it acquires rights and remedies under the Termination Clause, including the right to reprocure supplies or services similar to those terminated and charge the contractor the additional costs. See FAR 52.249-8(b).
2. If the contractor has complied substantially with the requirements of the contract, the government must give the contractor notice and the opportunity to correct minor defects before terminating the contract for default. Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).

D. Defective Performance AFTER the Required Delivery Date.

1. Generally, the government may terminate the contract for default.
2. If the contractor has complied substantially with the requirements of the contract, albeit after the required delivery date, the government should give the contractor notice of the defects and an opportunity to correct them. See Franklin E. Penny Co. v. United States, 524 F.2d 668 (Ct. Cl. 1975) (late nonconforming goods may substantially comply with contract requirements); Section IV, para. B.6, infra.

3. The government may accept nonconforming goods or services at a reduced price.
- E. Remedies if the Contractor Fails to Correct Defective Performance. If the contractor fails to correct defective performance after receiving notice and a reasonable opportunity to correct the work, the government may:
1. Contract with a commercial source to correct or replace the defective goods or services (obtaining funding is often difficult and may make this remedy impracticable), George Bernadot Co., ASBCA No. 42943, 94-3 BCA ¶ 27,242; Zimcon Professionals, ASBCA Nos. 49346, 51123, 00-1 BCA ¶ 30,839 (Government may contract with a commercial source to correct or replace the defective goods or services and may charge cost of correction to original contractor);
  2. Correct or replace the defective goods or services itself;
  3. Accept the nonconforming goods or services at a reduced price, or;
  4. Terminate the contract for default. FAR 52.246-4(f); Firma Tiefbau Meier, ASBCA No. 46951, 95-1 BCA ¶ 27,593.
- F. Special Rules for Service Contracts.
1. The inspection clause for fixed-price service contracts, FAR 52.246-4, is different than FAR 52.246-2, which pertains to fixed-price supply contracts.
  2. The government's remedies depend on whether it is possible for the contractor to perform the services correctly.
    - a. Normally, the government should permit the contractor to re-perform the services and correct the deficiencies, if possible. Pearl Properties, HUD BCA No. 95-C-118-C4, 96-1 BCA ¶ 28,219 (government's failure to give contractor notice and an opportunity to correct deficient performance waived right to reduce payment).

- b. Otherwise, the government may:
- (1) Require the contractor to take adequate steps to ensure future compliance with the contract requirements; and
  - (2) Reduce the contract price to reflect the reduced value of services received. Teltara, Inc., ASBCA No. 42256, 94-1 BCA ¶ 26,485 (government properly used random sampling inspections to calculate contract price reductions); Orlando Williams, ASBCA No. 26099, 84-1 BCA ¶ 16,983 (although termination for default (T4D) of janitorial contract was sustained, the government acted unreasonably by withholding maximum payments when some work had been performed satisfactorily). Even if it reduces the contract price, the government may also recover consequential damages. Hamilton Securities Advisory Servs., Inc. v. United States, 46 Fed. Cl. 164 (2000).
- c. Authorities disagree about whether the same failure in contract performance can support both a reduction in contract price and a termination for default. Compare W.M. Grace, Inc., ASBCA No. 23076, 80-1 BCA ¶ 14,256 (monthly deductions due to poor performance waived right to T4D during those months) and Wainwright Transfer Co., ASBCA No. 23311, 80-1 BCA ¶ 14,313 (deduction for HHG shipments precluded termination) with Cervetto Bldg. Maint. Co. v. United States, 2 Cl. Ct. 299 (1983) (reduction in contract price and termination cumulative remedies).

#### IV. STRICT COMPLIANCE VS. SUBSTANTIAL COMPLIANCE.

##### A. Strict Compliance.

1. As a general rule, the government is entitled to strict compliance with its specifications. Blake Constr. Co. v. United States, 28 Fed. Cl. 672 (1993); De Narde Construction Co., ASBCA No. 50288, 00-2 BCA ¶ 30,929 (government entitled to type of rebar it ordered, even if contrary to trade practice). See also Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985); Ace Precision Indus., ASBCA No. 40307, 93-2 BCA ¶ 25,629 (government rejection of line block final assemblies that failed to meet contract specifications was proper). But see Zeller Zentralheizungsbau GmbH, ASBCA No. 43109, 94-2 BCA ¶ 26,657 (government improperly rejected contractor's use of "equal" equipment where contract failed to list salient characteristics of brand name equipment).
2. Contractors must comply with specifications even if they vary from standard commercial practice. R.B. Wright Constr. Co. v. United States, 919 F.2d 1569 (Fed. Cir. 1990) (contract required three coats over painted surface although commercial practice was to apply only two); Graham Constr., Inc., ASBCA No. 37641, 91-2 BCA ¶ 23,721 (specification requiring redundant performance sustained).
3. Slight defects are still defects. Mech-Con Corp., GSBCA No. 8415, 88-3 BCA ¶ 20,889 (installation of 2" pipe insulation did not satisfy 1½" requirement).

##### B. Substantial Compliance.

1. "Substantial compliance" is a judicially created concept to avoid the harsh result of termination for default based upon a minor breach, and to avoid economic waste. The concept originated in construction contracts and has been extended to other types of contracts. See Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).

2. Substantial compliance gives the contractor the right to attempt to cure defective performance. The elements of substantial compliance are:
  - a. Timely delivery;
  - b. Contractor's good faith belief that it has complied with the contract's requirements, See Louisiana Lamps & Shades, ASBCA No. 45294, 95-1 BCA ¶ 27,577 (no substantial compliance because contractor had attempted unsuccessfully to persuade government to permit substitution of American-made sockets for specified German-made sockets);
  - c. Minor defects;
  - d. Defects that can be corrected within a reasonable time; and
  - e. Time is not of the essence, i.e., the government does not require strict compliance with the delivery schedule.
3. Generally, the doctrine of substantial compliance does not require the government to accept defective performance by the contractor. Cosmos Eng'rs, Inc., ASBCA No. 19780, 77-2 BCA ¶ 12,713.
4. **EXCEPTION—ECONOMIC WASTE.**
  - a. The doctrine of economic waste requires the government to accept noncompliant construction if the work, as completed, is suitable for its intended purpose and the cost of correction would far exceed the gain that would be realized. Granite Constr. Co. v. United States, 962 F.2d 998 (Fed. Cir. 1992), cert. denied, 113 S. Ct. 965 (1993); A.D. Roe Co., Inc., ASBCA No. 48782, 99-2 BCA ¶ 30,398 (economic waste is exception to general rule that government can insist on strict compliance with contract terms).

- b. To be “suitable for its intended purpose,” the work must substantially comply with the contract. Amtech Reliable Elevator Co. v. General Servs. Admin., GSBCA No. 13184, 95-2 BCA ¶ 27,821 (no economic waste where contractor used conduits for fire alarm wiring which were not as sturdy as required by specifications and lacked sufficient structural integrity); Triple M Contractors, ASBCA No. 42945, 94-3 BCA ¶ 27,003 (no economic waste where initial placement of reinforcing materials in drainage gutters reduced useful life from 25 to 20 years); Shirley Constr. Corp., ASBCA No. 41908, 93-3 BCA ¶ 26,245 (concrete slab not in substantial compliance even though it could support the design load; without substantial compliance, doctrine of economic waste inapplicable).
- 5. Except in those rare situations involving economic waste, the doctrine of substantial compliance affects only **when** the government may terminate for default. It does not preclude termination for default if the contractor fails to correct defective performance. The government:
  - a. Must give the contractor a reasonable amount of time to correct its work, including, if necessary, an extension beyond the original required delivery date.
  - b. May terminate for default if the contractor fails to correct defects within a reasonable period of time. Firma Tiefbau Meier, ASBCA No. 46951, 95-1 BCA ¶ 27,593 (termination for default justified by contractor’s repeated refusal to correct defective roof panels).
- 6. Radiation Technology, *supra*, established the concept of substantial compliance for the timely delivery of nonconforming goods. Franklin E. Penny Co. v. United States, *supra*, arguably expanded the concept to include late delivery of nonconforming goods. The courts and boards have not widely followed Penny; however, they have not overruled it.

## V. PROBLEM AREAS IN TESTING AND INSPECTION.

### A. Claims Resulting from Unreasonable Inspections.

1. Government inspections may give rise to equitable adjustment claims if they delay the contractor's performance or cause additional work. The government:
  - a. Must perform reasonable inspections. FAR 52.246-2. Donald C. Hubbs, Inc., DOT BCA No. 2012, 90-1 BCA ¶ 22,379 (more sophisticated test than specified, rolling straightedge, was reasonable).
  - b. Must avoid overzealous inspections. The government may not inspect to a level beyond that authorized by the contract. Overzealous inspection may impact adversely upon the government's ability to reject the contractor's performance, to assess liquidated damages, or to otherwise assert its rights under the contract. See The Libertatia Associates, Inc., 46 Fed. Cl. 702 (2000) (COR told contractor's employees that he was Jesus Christ and that CO was God); Gary Aircraft Corp., ASBCA No. 21731, 91-3 BCA ¶ 24,122 ("overnight change" in inspection standards was unreasonable); Donohoe Constr. Co., ASBCA No. 47310, 98-2 BCA ¶ 30,076, motion for reconsideration granted in part on other grounds, ASBCA No. 47310, 99-1 BCA ¶ 30,387 (government quality control manager unreasonably rejected proposed schedules, ignored contractor submissions for weeks, and told contractor he would "get even" with him).
  - c. Must resolve ambiguities involving inspection requirements in a timely manner. P & M Indus., ASBCA No. 38759, 93-1 BCA ¶ 25,471.
  - d. Must exercise reasonable care when performing tests and inspections prior to acceptance of products or services, and may not rely solely on destructive testing of products after acceptance to discover a deficiency it could have discovered before acceptance. Ahern Painting Contractors, Inc., GSBCA No. 7912, 90-1 BCA ¶ 22,291.



2. Improper inspections:

- a. May excuse a contractor's delay, thereby delaying or preventing termination for default. Puma Chem. Co., GSBICA No. 5254, 81-1 BCA ¶ 14,844 (contractor justified in refusing to proceed when government test procedures subjected contractor to unreasonable risk of rejection).
- b. May justify claims for increased costs of performance under the delay of work or changes clauses in the contract. See, e.g., Hull-Hazard, Inc., ASBCA No. 34645, 90-3 BCA ¶ 23,173 (contract specified joint inspection, however, government conducted multiple inspections and bombarded contractor with "punch lists"); H.G. Reynolds Co., ASBCA No. 42351, 93-2 BCA ¶ 25,797; Harris Sys. Int'l, Inc., ASBCA No. 33280, 88-2 BCA ¶ 20,641 (10% "spot mopping" specified, government demanded 100% for "uniform appearance"). But see Trans Western Polymers, Inc. v. Gen. Servs. Admin., GSBICA No. 12440, 95-1 BCA ¶ 27,381 (government properly performed lot by lot inspection after contractor failed to maintain quality control system); Space Dynamics Corp., ASBCA No. 19118, 78-1 BCA ¶ 12,885 (defects in aircraft carrier catapult assemblies justified increased government inspection).
- c. May give rise to a claim of government breach of contract. Adams v. United States, 358 F.2d 986 (Ct. Cl. 1966) (government breached contract when inspector disregarded inspection plan, doubled inspection points, complicated construction, delayed work, increased standards, and demanded a higher quality tent pin than specified); Electro-Chem Etch Metal Markings, Inc., GSBICA No. 11785, 93-3 BCA ¶ 26,148. But see Southland Constr. Co., VABCA No. 2217, 89-1 BCA ¶ 21,548 (government engineer's "harsh and vulgar" language, when appellant contributed to the tense atmosphere, did not justify refusal to continue work).

3. It is a constructive change to test a standard commercial item to a higher level of performance than is required in commercial practice. Max Blau & Sons, Inc., GSBICA No. 9827, 91-1 BCA ¶ 23,626 (insistence on extensive deburring and additional paint on a commercial cabinet was a constructive change).

4. Government breach of its duty to cooperate with the contractor may shift the cost of damages caused by testing to the government. See Alonso & Carus Iron Works, Inc., ASBCA No. 38312, 90-3 BCA ¶ 23,148 (government refusal to permit reasonable, preliminary test proposed by contractor shifted the risk of loss to the government).

B. Waiver, Prior Course of Dealing, and Other Acts Affecting Testing and Inspection.

1. By his actions, an authorized government official may waive contractual requirements. See generally Longmire Coal Corp., ASBCA No. 31569, 86-3 BCA ¶ 19,110. The elements of waiver are:
  - a. Authorized government official;
  - b. Knowledge by government official of true facts;
  - c. Ignorance by contractor of true facts; and
  - d. Detrimental reliance by the contractor.
2. Normally, previous government acceptance of similar nonconforming performance is insufficient to demonstrate waiver of specifications.
  - a. Government acceptance of nonconforming performance by other contractors normally does not waive contractual requirements. Moore Elec. Co., ASBCA No. 33828, 87-3 BCA ¶ 20,039 (government's allowing deviation to another contractor on prior contract for light pole installation did not constitute waiver, even where both contractors used the same subcontractor).
  - b. Government acceptance of nonconforming performance by the same contractor normally does not waive contractual requirements. Basic Marine, Inc., ENG BCA No. 5299, 87-1 BCA ¶ 19,426.

3. Numerous government acceptances of similar nonconforming performance by the same contractor may waive the requirements of that particular specification. Gresham & Co. v. United States, 470 F.2d 542 (Ct. Cl. 1972) (acceptance of dishwashers without detergent dispensers eventually waived requirement to equip with dispensers); Astro Dynamics, Inc., ASBCA No. 28381, 88-3 BCA ¶ 20,832 (acceptance of seven shipments of rocket tubes with improper dimensions precluded termination for default for same reason on the eighth shipment). But see Kvass Constr. Co., ASBCA No. 45965, 94-1 BCA ¶ 26,513 (Navy's acceptance on four prior construction contracts of "expansion compensation devices" for a heat distribution system did not waive contract requirement for "expansion loops").
4. Generally, an inspector's failure to require correction of defects is insufficient to waive the right to demand correction. Hoboken Shipyards, Inc., DOT BCA No. 1920, 90-2 BCA ¶ 22,752 (government not bound by an inspector's unauthorized agreement to accept improper type of paint if a second coat was applied).

## VI. ACCEPTANCE.

- A. Definition. Acceptance is the act of an authorized representative of the government that asserts ownership of identified supplies tendered or approves specific services performed in partial or complete fulfillment of contractual requirements. FAR 46.101.
- B. General Principles of Acceptance.
  1. Acceptance is conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided for in the contract, e.g., warranties. FAR 52.246-2(k); Hogan Constr., Inc., ASBCA No. 39014, 95-1 BCA ¶ 27,398 (government improperly terminated contract for default after acceptance).
  2. Acceptance entitles the contractor to payment and is the event that marks the passage of title from the contractor to the government.

3. The government generally uses a DD Form 250 to expressly accept tendered goods or services.
4. The government may impliedly accept goods or services by:
  - a. Making final payment. Norwood Precision Prods., ASBCA No. 24083, 80-1 BCA ¶ 14,405. See also Farruggio Constr. Co., DOT CAB No. 75-2-75-2E, 77-2 BCA ¶ 12,760 (progress payments on wharf sheeting contract did not shift ownership and risk of loss to the government). Note, however, that payment, even if no more monies are due under a contract, does not necessarily constitute final acceptance. Spectrum Leasing Corp., GSBCA No. 7347, 90-3 BCA ¶ 22,984 (no acceptance because contract provided that final testing and acceptance would occur after the last payment). See also Ortech, Inc., ASBCA No. 52228, 00-1 BCA ¶ 30,764 (A contractor's acceptance of final payment from the government may preclude a later claim by the contractor).
  - b. Unreasonably delaying acceptance. See, e.g., Cudahy Packing Co. v. United States, 75 F. Supp. 239 (Ct. Cl. 1948) (government took two months to reject eggs); Mann Chem. Labs, Inc. v. United States, 182 F. Supp. 40 (D. Mass. 1960).
  - c. Using or changing a product. Ateron Corp., ASBCA No. 46,867, 96-1 BCA ¶ 28,165 (government use of products inconsistent with contractor's ownership); The Interlake Cos. v. General Servs. Admin., GSBCA No. 11876, 93-2 BCA ¶ 25,813 (government improperly rejected material handling system after government changes rendered computer's preprogrammed logic useless).
5. Unconditional acceptance of partial deliveries may waive the right to demand that the final product perform satisfactorily. See Infotec Dev., Inc., ASBCA No. 31809, 91-2 BCA ¶ 23,909 (multi-year contract for Minuteman Missile software).

6. As a general rule, contractors bear the risk of loss or damage to the contract work prior to acceptance. See FAR 52.246-16, Responsibility for Supplies (supply); FAR 52.236-7, Permits and Responsibilities (construction). See also Meisel Rohrbau GmbH, ASBCA No. 40012, 92-1 BCA ¶ 24,716 (damage caused by children); DeRalco Corp., ASBCA No. 41306, 91-1 BCA ¶ 23,576 (structure destroyed by 180 MPH hurricane winds although construction was 97% complete and only required to withstand 100 MPH winds).

- a. If the contract specifies f.o.b. destination, the contractor bears the risk of loss during shipment even if the government accepted the supplies prior to shipment. FAR 52.246-16; KAL M.E.I. Mfg. & Trade Ltd., ASBCA No. 44367, 94-1 BCA ¶ 26,582 (contractor liable for full purchase price of cover assemblies lost in transit, even though cover assemblies had only scrap value).
- b. In construction contracts, the government may use and possess the building prior to completion. FAR 52.236-11, Use and Possession Prior to Completion. The contractor is relieved of responsibility for loss of or damage to work resulting from the government's possession or use. See Fraser Eng'g Co., VABCA No. 3265, 91-3 BCA ¶ 24,223 (government responsible for damaged cooling tower when damage occurred while tower was in its sole possession and control).

C. Exceptions to the Finality of Acceptance.

- 1. Latent defects may enable the government to avoid the finality of acceptance. To be latent, a defect must have been:
  - a. Unknown to the government. See Gavco Corp., ASBCA No. 29763, 88-3 BCA ¶ 21,095;
  - b. In existence at the time of acceptance. See Santa Barbara Research Ctr., ASBCA No. 27831, 88-3 BCA ¶ 21,098; mot. for recon. denied, 89-3 BCA ¶ 22,020 (failure to prove crystalline growths were in laser diodes at the time of acceptance and not reasonably discoverable); and

- c. Not discoverable by a reasonable inspection. Munson Hammerhead Boats, ASBCA No. 51377, 00-2 BCA ¶ 31,143 (defects in boat surface, under paint and deck covering, not reasonably discoverable by government till four months later); Stewart & Stevenson Services, Inc., ASBCA No. 52140, 00-2 BCA ¶ 31,041 (government could revoke acceptance even though products passed all tests specified in contract); Wickham Contracting Co., ASBCA No. 32392, 88-2 BCA ¶ 20,559 (failed spliced telephone and power cables were latent defects and not discoverable); Dale Ingram, Inc., ASBCA No. 12152, 74-1 BCA ¶ 10,436 (mahogany plywood was not a latent defect because a visual examination would have disclosed); *But see Perkin-Elmer Corp. v. United States.*, 47 Fed. Cl. 672 (2000) (six years was too long to wait before revoking acceptance based on latent defect).
- 2. Contractor fraud allows the government to avoid the finality of acceptance. See D&H Constr. Co., ASBCA No. 37482, 89-3 BCA ¶ 22,070 (contractors' use of counterfeited National Sanitation Foundation and Underwriters' Laboratories labels constituted fraud). To establish fraud, the government must prove that:
  - a. The contractor intended to deceive the government;
  - b. The contractor misrepresented a material fact; and
  - c. The government relied on the misrepresentation to its detriment. BMY – Combat Sys. Div. Of Harsco Corp., 38 Fed.Cl. 109 (1997) (contractor's knowing misrepresentation of adequate testing was fraud); United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972).
- 3. A gross mistake amounting to fraud may avoid the finality of acceptance. The elements of a gross mistake amounting to fraud are—
  - a. A major error, without intent to deceive, causing the government to accept nonconforming performance;
  - b. The contractor's misrepresentation of a fact; and

- c. Detrimental government reliance on the misrepresentation. Z.A.N. Co., ASBCA No. 25488, 86-1 BCA ¶ 18,612 (gross mistake amounting to fraud established where the government relied on Z.A.N. to verify watch caliber and Z.A.N. accepted watches from subcontractor without proof that the caliber was correct).
4. Warranties. Warranties operate to revoke acceptance if the nonconformity is covered by the warranty.
5. Once the government revokes acceptance, its normal rights under the inspection, disputes, and default clauses of the contract are revived. FAR 52.246-2(l) (Inspection-Supply clause expressly revives rights); Spandome Corp. v. United States, 32 Fed. Cl. 626 (1995) (government revoked acceptance, requested contractor to repair structure, and demanded return of purchase price when contractor refused); Jo-Bar Mfg. Corp., ASBCA No. 17774, 73-2 BCA ¶ 10,311 (contractor's failure to heat treat aircraft bolts entitled government to recover purchase price paid). Cf. FAR 52.246-12 (Inspection-Construction clause is silent on reviving rights).

## VII. WARRANTY.

### A. General Principles.

1. Warranties may extend the period for conclusive government acceptance.
2. Warranties may be express or implied. Fru-Con Constr. Corp., 42 Fed. Cl. 94 (1998) (design specifications result in an implied warranty; no implied warranty with performance specifications because of the broader discretion afforded the contractor in their implementation).
3. Normally, warranties are defined by the time and scope of coverage.
4. The use of warranties is not mandatory. FAR 46.703. In determining whether a warranty is appropriate for a specific acquisition, consider:
  - a. Nature and use of the supplies or services;



- b. Cost;
- c. Administration and enforcement;
- d. Trade practice; and
- e. Reduced quality assurance requirements, if any.
- f. GSA schedule contracts may no longer routinely provide commercial warranties.

B. Asserting Warranty Claims.

- 1. When asserting a warranty claim, the government must prove:
  - a. That there was a defect when the contractor completed performance. Vistacon Inc. v. General Servs. Admin., GSBICA No. 12580, 94-2 BCA ¶ 26,887;
  - b. That the warranted defect was the most probable cause of the failure. Hogan Constr., Inc., ASBCA No. 38801, 95-1 BCA ¶ 27,396, A.S. McGaughan Co., PSBCA No. 2750, 90-3 BCA ¶ 23,229; R.B. Hazard, Inc., ASBCA No. 41061, 91-2 BCA ¶ 23,709 (government denied recovery under warranty theory because it failed to prove that pump failure was not the result of government misuse and that defective material or workmanship was the most probable cause of the damage);
  - c. That the defect was within the scope of the warranty;
  - d. That the defect arose during the warranty period;
  - e. That the contractor received notice of the defect and its breach of the warranty; and

- f. The cost to repair the defect, if not corrected by the contractor. Hoboken Shipyards, Inc., DOT BCA No. 1920, 90-2 BCA ¶ 22,752. See Globe Corp., ASBCA No. 45131, 93-3 BCA ¶ 25,968 (board reduced government's claim against the contractor because the government inconsistently allocated the cost of repairing the defects).
  2. The government may invalidate a warranty through improper maintenance, operation, or alteration.
  3. A difficult problem in administering warranties on government contracts is identifying and reporting defects covered by the warranty.
  4. Warranty clauses survive acceptance. Shelby's Gourmet Foods, ASBCA No. 49883, 01-1 BCA ¶ 31,200 (government entitled to reject defective "quick-cooking rolled oats" under warranty even after initial acceptance).
- C. Remedies for Breach of Warranty. The FAR provides the basic outline for governmental remedies. See FAR 52.246-17 and 52.246-18. If the contractor breaches a warranty clause, the government may—
1. Order the contractor to repair or replace the defective product;
  2. Retain the defective product at a reduced price;
  3. Correct the defect in-house or by contract if the contractor refuses to honor the warranty; or
  4. Permit an equitable adjustment in the contract price. However, the adjustment cannot reduce the price below the scrap value of the product.
- D. Mitigation of Damages.
1. The government must attempt to mitigate its damages.

2. The government may recover consequential damages. Norfolk Shipbldg. and Drydock Corp., ASBCA No. 21560, 80-2 BCA ¶ 14,613 (government entitled to cost of repairs caused by ruptured fuel tank).

### VIII. CONCLUSION.

## **APPENDIX A**

### **Discussion Problem No. 1**

#### **FACTS:**

A contract for the construction of shipping barges specified no particular tests as part of the government inspection process. The government intended to use the barges to ship goods along the coast. The government intended the barges to sail close to the shoreline, no more than 3 miles from land. As part of the inspection process, the government demanded that the contractor sail the barges for one whole day 10 miles out to sea. During the test, high seas swamped the barges and the crew lost the test cargo. The government rejected the barges, claiming they had failed the seaworthy test. The contractor filed a claim. What do you tell the contracting officer?

#### **NOTES:**

Discussion Problem No. 2

**FACTS:**

On the delivery date specified in the contract, the contractor delivers the goods to the government. The government inspector finds the goods to be non-conforming. What can the government do?

**NOTES:**



***Chapter 19***  
**Government  
Information Practices**



***146th Contract Attorneys Course***

## CHAPTER 19

# GOVERNMENT INFORMATION PRACTICES

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## I. REFERENCES.

- A. Freedom of Information Act, 5 U.S.C. § 552, as amended.
- B. DOD Regulation 5400.7-R, DOD Freedom of Information Act Program, 22 May 1997.
- C. U.S. Department of Justice, Freedom of Information Act Guide & Privacy Act Overview (2000 ed.), an annual Department of Justice publication (available on the World Wide Web at <http://www.usdoj.gov/foia>).
- D. DFOISR Memorandum, Subject: DoD Policy Concerning Release of Unit Prices under the FOIA, 00-CORR-025, 3 March 2000 (Appendix D)  
<http://www.defenselink.mil/pubs/foi/unitprices.pdf>
- E. DFOISR Memorandum, Subject: FOIA Policy on DOD Application of Critical Mass Energy Project v. NRC, 93-CORR-094, 27 Jul 1993.
- F. DFOISR Memorandum, Subject: Interim Guidance on DOD Application of Critical Mass Energy Project v. NRC, 93-CORR-037, 23 Mar 1993.
- G. "OIP Guidance: The Critical Mass Distinction Under Exemption 4," and "FOIA Counselor: Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking," FOIA Update, Spring 1993, at 3-7.

## II. AGENCY RECORDS -- POSSESSION AND CONTROL.

- A. Records prepared by contractor, but possessed and paid for by agency, are agency records. Hercules, Inc. v. Marsh, 839 F.2d 1027 (4th Cir. 1988) (reverse FOIA) (Radford Army Ammunition Plant telephone directory).
- B. Records possessed exclusively by contractor held not agency records because not subject to agency "possession and control." Rush Franklin Publishing, Inc. v. NASA, No. 90-CV-285 (E.D.N.Y. Apr. 13, 1993). But see Burka v. HHS, 87 F.3d 508 (D.C. Cir. 1996) (computer tapes maintained by contractor held to be agency records based on extensive supervision and control exercised by the agency over the collection and analysis of the data").
- C. Electronic database provided by contractor under specific license limiting dissemination held not an agency record because agency lacks control. Tax Analysts v. United States Department of Justice, 913 F. Supp. 599 (D.D.C. 1996),

aff'd, 107 F.3d 923 (D.C. Cir.) (table cite), cert. denied, 118 S.Ct. 336 (1997).

- D. Video conferencing software developed by contractor (under contract which provided that all records generated are property of the agency, unless, as in this case, contractor receives permission to keep intellectual property and takes steps to commercialize it, in which case government receives a "nonexclusive license to use the intellectual property on behalf of the United States") held not be an agency record because agency lacks control since "it does not have unrestricted use of it." Gilmore v. United States Dep't of Energy, 4 F.Supp. 2d 912 (N.D. Cal. 1998).
- E. Records created by agency employees exclusively for own convenience held personal rather than agency records. Hamrick v. Department of the Navy, No. 90-283 (D.D.C. Aug. 28, 1992) (steno pads containing contracting officer's handwritten memory joggers created "without being directed to do so by the Agency for her own personal reasons and maintained . . . for her own convenience"), appeal dismissed, No. 92-5376 (D.C. Cir. Aug. 4, 1995).

### III. EXEMPTION 1 -- CLASSIFIED INFORMATION.

- A. Details of procurement of armored limousines for President properly classified. U.S. News & World Report v. Department of the Treasury, No. 84-2303 (D.D.C. Mar. 26, 1986).
- B. In rare cases mere existence of particular procurement may be classified. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) (request for procurement records concerning Glomar Explorer submarine-retrieval ship; consequently "neither confirm nor deny" response known as "Glomar" response or "Glomarization").

### IV. EXEMPTION 2 -- Internal personnel Rules and Practices.

- A. Audit guidelines protectible where "disclosure would reveal Department of Defense rationale and strategy" for audit and would "create a significant risk that this information would be used by interested parties to frustrate ongoing or future audits." Knight v. DOD, No. 87-480 (D.D.C. Feb. 11, 1988).
- B. Documents peculiar to FTS 2000 procurement held not protectible under Exemption 2 after contract let because not "internal" to GSA and no risk of future circumvention of agency regulations due to unique nature of that procurement. MCI Telecommunications Corp. v. GSA, No. 89-0746, 1992 WL 71394 (D.D.C.

Mar. 25, 1992) (dicta).

**V. EXEMPTION 3 -- DISCLOSURE PROHIBITED BY ANOTHER STATUTE.**

- A. Procurement Integrity Act, 41 U.S.C. § 423, appears to qualify.
- B. DOD FY 97 Authorization Act provisions prohibiting release of contractor proposals, 10 U.S.C. § 2305 and 41 U.S.C. § 253b, qualify.
- C. Trade Secrets Act, 18 U.S.C. § 1905, does not qualify. CNA Fin. Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987).

**VI. EXEMPTION 4 -- "TRADE SECRETS," COMMERCIAL OR FINANCIAL INFORMATION OBTAINED FROM A PERSON, AND PRIVILEGED OR CONFIDENTIAL.**

- A. "Trade secret" given narrow definition in FOIA context; limited to "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983). See, e.g., Center for Auto Safety v. National Highway Traffic Safety Admin., 93 F. Supp. 2d 1 (D.D.C. 2000) (appeal pending) (holding that "physical or performance characteristics of air bags" are not "trade secrets"); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044 (D.D.C. Nov. 20, 1987) (design drawings of airplane fuel pumps developed by private company and used by Air Force are trade secrets).
- B. "Confidential" test under National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).
  - 1. "Impair the Government's ability to obtain necessary information in the future." For only case so holding in procurement context, see Orion Research, Inc. v. EPA, 615 F.2d 551 (1st Cir. 1980) (finding impairment for technical proposals because release "would induce potential bidders to submit proposals that do not include novel ideas"). But see McDonnell Douglas Corp. v. NASA, 981 F. Supp. 12, 15 (D.D.C. 1997) (no impairment because "[g]overnment contracting involves millions of

dollars and it is unlikely that release of this information will cause [agency] difficulty in obtaining future bids”) rev’d on other grounds, 180 F.3d 303 (D.C. Cir. 1999); RMS Indus. v. DOD, No. C-92-1545 (N.D. Cal. Nov. 24, 1992) (no impairment for “contract bid prices, terms and conditions . . . since bids by nature are offers to provide goods and/or services for a price and under certain terms and conditions”); Racal-Milgo Gov’t Sys. v. SBA, 559 F. Supp. 4 (D.D.C. 1981) (“It is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed.”).

2. “Cause substantial harm to the competitive position of the person from whom the information was obtained.”

- a. For examples of cases finding competitive harm, see Gulf & Western Indus. v. United States, 615 F.2d 527 (D.C. Cir. 1979) (actual costs, break even calculations, profits and profit rates); National Parks, supra (detailed financial information including company’s assets, liability and net worth); RMS Indus., supra (technical and commercial data, names of consultants and subcontractors, performance cost and equipment information); see also Gilmore, supra (software which had been licensed to to third parties for as much as \$200,000.00).
- b. For examples of cases finding no competitive harm, see GC Micro Corp. v. DLA, 33 F.3d 1109 (9th Cir. 1994) (“percentage and dollar amount of work contracted out to SDB’s on each defense contract” is “made up of too many fluctuating variables”); Pacific Architects & Eng’rs v. United States Dep’t of State, 906 F.2d 1345 (9th Cir. 1990) (reverse FOIA) (unit prices); Hercules, Inc., supra (simply no competition for Radford Army Ammunition Plant contract).
- c. Disclosure or Protection of unit prices based on date of contract solicitation --
  - (1) McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999), reh’g denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999) (finding line item price information from contract resulting from pre-1998 contract solicitation to be confidential commercial or financial information under the National Parks test)

(2) FAR, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2), requires disclosure of unit prices, at time of award and upon request, in government contracts solicited after 1 January 1998.

(3) NOTE – DOD's position that unsuccessful offeror's unit prices are normally releasable under a National Parks competitive harm analysis has now been overtaken by DOD FY 97 Authorization Act (b)(3) provision. See DFOISR Memorandum, Subject: DoD Policy Concerning Release of Unit Prices under the FOIA, 00-CORR-025, 3 March 2000. Appendix D.

d. Duty to segregate nonexempt information. Dynalelectron Corp. v. Department of the Air Force, No. 83-3399 (D.D.C. Oct. 30, 1984) (approving agency decision to disclose technical proposal's title pages, table of contents, and proprietary rights statement page).

C. "Confidential" test modified by Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (en banc).

1. For "required" submissions, apply National Parks.
2. For "voluntary" submissions, determine whether information is "of a kind that would customarily not be released to the public by the person from whom it was obtained."
3. Threshold determination as to whether information submission is "required."
  - a. Does agency possess legal authority to require information submission: statute, executive order, regulation, or "less formal mandate?"
  - b. Has agency exercised such authority?
  - c. Whether submitter's participation in agency program was voluntary is not the test.
4. DOD and Department of Justice position is that information submitted

pursuant to FAR, invitation for bid, or request for proposal is a "required" submission.

5. For a sample of the variety of Critical Mass case law in the procurement context, see Frazee v. United States Forest Serv., 97 F.3d 367 (9th Cir. 1996) ("proposed operating plan" submitted in response to solicitation for offers not "voluntarily" submitted under Critical Mass) (dicta); McDonnell Douglas Corp. v. NASA, 981 F.Supp 12 (D.D.C. 1997) (contractor line item prices not "voluntarily" submitted under Critical Mass), reversed on other grounds, 180 F.3d 303 (D.C. Cir. 1999); Comdisco, Inc. v. GSA, 864 F. Supp. 510 (E.D. Va. 1994) (reverse FOIA) (district court finds Critical Mass inapplicable in 4th Circuit) (dicta); See also Mallinckrodt Inc. v. West, No. 99-2276, 2000 U.S. Dist. LEXIS 11008 (D.D.C. June 22, 2000) (observing that "it is beyond dispute that unit pricing data is required to be submitted," but finding that rebate and incentive provisions do not constitute pricing data and ruling that they were voluntarily provided under Critical Mass because Blanket Purchase Agreement solicitation stated that they "should," rather than "must," be provided); Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8 (D.D.C. 1996) (negotiated G&A rate ceilings, not required in solicitation but merely requested by contracting officer held "voluntarily submitted under Critical Mass"), appeal dismissed voluntarily, No. 96-5163 (D.C. Cir. July 3, 1996).

D. Determining whether business information is exempt: Notice to submitter; Executive Order 12,600, July 23, 1987; DOD Reg. 5400.7-R, para 5-207; importance of developing administrative record to support decision to release information.

1. Reverse-FOIA suit.
2. Review of agency action under Administrative Procedure Act limited to administrative record. See, e.g., Acumenics Research & Technology v. Dept. of Justice, 843 F.2d 800 (4th Cir. 1988). For an example of proposed disclosure being held arbitrary and capricious based on an insufficient agency record, see McDonnell Douglas Corp. v. NASA, No. 91-3134 (D.D.C. Jan. 24, 1993)(bench order).
3. Full submitter notice for disclosure of contractor's unit prices not required for contracts resulting from post-January 1, 1998 contract solicitations because disclosure pursuant to a properly promulgated and statutorily based agency regulation, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2), is

"authorized by law." Chrysler Corp. v. Brown, 441 U.S. 281, 295-316 (1979). See DFOISR Memorandum, Subject: DoD Policy Concerning Release of Unit Prices under the FOIA, 00-CORR-025, 3 March 2000 [web site]

- E. Does Trade Secrets Act, 18 U.S.C. § 1905, limit the agency's ability to disclose business information under the FOIA as a matter of discretion?
1. Trade Secrets Act applies broadly to virtually all business information and prohibits agency disclosures except as "authorized by law."
  2. FOIA provides "authority" to disclose business information only if nonexempt. CNA Fin. Corp. v. Donovan, *supra* (Trade Secrets Act and Exemption 4 held to be coextensive).
  3. FAR disclosure provisions, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2) provide such "authority," independent of the FOIA, for unit prices in contracts resulting from post January 1, 1998 contract solicitations.

## **VII. EXEMPTION 5 -- INTER- AND INTRA-AGENCY DOCUMENTS NORMALLY PRIVILEGED IN THE CIVIL DISCOVERY CONTEXT.**

- A. Deliberative process privilege.
1. Records must be predecisional and deliberative.
  2. For a wide variety of exempt procurement-related examples, see MCI Telecommunications Corp. v. GSA, *supra* (source selection plan; initial checklist/appraisal of sufficiency of initial proposals; individual and consensus panel evaluations of initial proposals; panel lists of unresolved issues relating to initial proposals; notices of discrepancy/clarification relating to initial proposals; demonstration site visit agendas and reports; negotiation strategy memos, agendas and reports; test traffic data base and validations; ACS validation data; individual and consensus panel evaluations of best and final offers; final source selection evaluation board evaluation report; source selection advisory committee briefing materials; final award recommendation).

3. Note that the FAR provision concerning debriefing of offerors somewhat expands the range of information to be disclosed thereby removing Exemption 5 protection for many of these items. See 48 C.F.R. § 15.506 (1997).
  4. Deliberative process privilege material may be appropriate for post-award consideration of discretionary disclosure.
  5. Vaughn Index. Index must be prepared with sufficient specificity to establish how each document contributed to deliberative process. Animal Legal Defense Fund v. Department of the Air Force, 44 F. Supp 2d 295 (D.D.C. 1999) (holding that Vaughn Index related to AF chimpanzee divestment "utterly failed to specify the role played by each withheld document in the course of developing that policy.").
- B. Attorney-client privilege. Mead Data Cent., Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977).
- C. Agency commercial information. Morrison-Knudsen Co. v. Department of the Army, 595 F. Supp. 352 (D.D.C. 1984) (agency's background documents used to calculate its bid in "contracting out" procedure), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (table cite); Hack v. Department of Energy, 538 F.Supp. 1098 (D.D.C. 1992)(inter-agency cost estimates prepared by government for use in evaluating construction proposals submitted by private contractors).

## VIII. EXEMPTION 6 -- PERSONAL PRIVACY.

- A. Resumes of proposed professional staff to be utilized by government contractor protected. Professional Review Org. v. HHS, 607 F. Supp. 423 (D.D.C. 1985).
- B. Identities of contractor's employees required to be submitted under Davis-Bacon Act protected, but nonidentifying information required to be disclosed Sheet Metal Workers Int'l Ass'n, Local Union No. 19 v. VA, 135 F.3d 891 (3d Cir. 1998) (citing identical holdings by 2d, 9th, 10th and D. C. Circuit Courts of Appeals).



**IX. EXEMPTION 7(A) -- RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES, THE DISCLOSURE OF WHICH COULD REASONABLY BE EXPECTED TO INTERFERE WITH ENFORCEMENT PROCEEDINGS.** Periodic audits by defense contract audit agency which were subsequently "recompiled" into a pending criminal investigation of the contractor protected. John Doe Agency V. John Doe Corp., 493 U.S. 146 (1989).

**X. CONCLUSION**

## APPENDIX A.

### SAMPLE LETTER TO CONTRACTOR UPON RECEIPT OF A FOIA REQUEST

The Army has received a request under the Freedom of Information Act (FOIA) for Contract # \_\_\_\_\_ for the (on site maintenance of Government owned ADPE Equipment). Our review of the contract reveals that certain contract data supplied by \_\_\_\_\_ may fall within exemption 4 to the FOIA.

Under this exemption the Army may refuse to disclose trade secrets and commercial or financial information obtained from a source outside the Government and which is privileged or confidential. Commercial or financial information is considered confidential if its disclosure is likely to cause substantial competitive harm to the source of the information.

In order for us to make a determination regarding the release of the contract under consideration the Army must have a detailed justification of the reasons your firm believes the information requested should not be released under Exemption 4 of the FOIA. We believe that you are in a good position to explain the commercial sensitivity of the information contained in the contract which relates to the (confidential or privileged information) from your proposal.

In this regard please provide this office with a specific description concerning how disclosure of (confidential or privileged information) or related information in the contract would cause substantial harm to \_\_\_\_\_'s present or future competitive position. Some factors you may wish to describe are: the general custom or usage in your business regarding this type of information, the number and position of persons who have, or have had, access to the information, the type and degrees of commercial injury that disclosure would cause and the length of time you feel confidential treatment is warranted. Due to the response time limits imposed on the government in these cases we request that you provide your response by \_\_\_\_\_. If we have not heard from you by that date we will assume that your firm has no objection to disclosure of the contract in its entirety.

We will carefully consider the justification you provide us and will endeavor to protect your proprietary data to the extent permitted under law. Should we disagree with your position regarding some or all of the information requested, and determine it to be releasable, we will provide you with advance notice of our decision so that you may take whatever steps you consider appropriate to protect your interests.

## **APPENDIX B -- 10 U.S.C. §2305**

Armed Services Acquisitions -- Section 2305 of Title 10, United States Code, is amended by adding the following new subsection:

“(g) **PROHIBITION ON RELEASE OF CONTRACTOR PROPOSALS.** -- (1) Except as provided in paragraph (2), a proposal in the possession or control of an agency named in section 2303 of this title may not be made available to any person under section 552 of Title 5.

(2) Paragraph (1) does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the Department and the contractor that submitted the proposal.

(3) In this subsection, the term ‘proposal’ means any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.”

## **APPENDIX C -- 41 U.S.C. § 253B**

Civilian Agency Acquisitions. Section 303B of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 253b) is amended by adding the following new subsection:

“(m) **PROHIBITION ON RELEASE OF CONTRACTOR PROPOSALS.** -- (1) Except as provided in paragraph (2), a proposal in the possession or control of an executive agency may not be made available to any person under section 552 of Title 5, United States Code.

(2) Paragraph (1) does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal.

(3) In this subsection, the term ‘proposal’ means any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.”

## APPENDIX D



DEPARTMENT OF DEFENSE  
DIRECTORATE FOR FREEDOM OF INFORMATION AND SECURITY REVIEW  
1155 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1155

March 3, 2000

00-CORR-025

### MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: DoD Policy Concerning Release of Unit Prices under the FOIA

A number of questions have been raised within the Department of Defense (DoD) concerning the decision of the Court of Appeals in the case of McDonnell Douglas Corp. v. NASA, 180 F3d 303 (D.C Cir 1999). Specifically, these questions concern whether DoD has changed its policy on release of unit prices within Government contracts. The Department of Justice (DOJ) held a meeting addressing these concerns on February 24, 2000, and distributed the attached issue paper. This memorandum addresses DoD policy in light of the results of that meeting.

The attached OASD (PA) memorandum dated February 8, 1998 reflects DoD policy regarding the release of unit prices in solicitations for contracts issued on or after January 1, 1998. This policy, based on a change to the Federal Acquisition Regulation (FAR), Part 15, states that unit prices in contracts solicited on or after January 1, 1998 will be released with no submitter notification required. The McDonnell Douglas decision has no effect on the change to the FAR, and the release of unit price information in contracts solicited on or after January 1, 1998. DoD policy has not changed as a result of this decision.

For contracts solicited prior to January 1, 1998, the procedures set forth in Section C5.2.8.1 of DoD 5400.7-R, "DOD Freedom of Information Act Program," will be followed. Submitter notice will be given to contractors advising them of the intent to release unit prices, and giving them the opportunity to state their concerns. In accordance with Section C5.2.8.1 of DoD 5400.7-R, objections to release of unit prices will be evaluated, and the final decision to disclose information claimed to be exempt will be made by the DoD component. If the DoD component disagrees with the submitter and decides to release unit prices, the submitter will be informed of the intention to release the information, and given enough time to initiate a reverse FOIA lawsuit. The McDonnell Douglas decision relies on its specific facts and does not establish a new legal requirement limiting disclosure.



The attached DOJ issue paper offers guidance on how to respond to submitter claims that the McDonnell Douglas decision sets a precedent for the withholding of unit prices in contracts not subject to the revised FAR, Part 15. Specifically, these arguments concern potential competitors underbidding in future contracts, and commercial customers "ratcheting down" the submitter's prices. Regarding the argument that release of unit prices would permit underbidding, DoD components should rely, in appropriate cases, on the analysis adopted by the court in Acumenics Research & Tech., Inc. v. United States Department of Justice, 843 F.2d 800, 808 (4<sup>th</sup> Cir. 1988) (reverse FOIA suit), and Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1347 (9<sup>th</sup> Cir. 1990) (reverse FOIA suit). These cases upheld agency determinations that no underbidding harm is caused by release of unit prices. The assertion that release of unit prices would allow customers to "ratchet down" or cause prices to fall because of consumer knowledge of the submitter's price to the government also has precedent cases countering the concept. DoD components should rely, in appropriate cases, on Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) and CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) to demonstrate that competitive harm, as encompassed by exemption 4, is limited to harm flowing from the affirmative use of proprietary information by competitors only, and does not include harm to commercial customers, consumers, or some other general economic harm.

Components are reminded that provisions have been made for withholding unit prices prior to the awarding of a contract, and for withholding unit prices contained in unsuccessful proposals. As stated within the attached OASD (PA) memorandum dated February 8, 1998, unit prices are withheld prior to contract award in accordance with 41 USC 423, Procurement Integrity Act, and unit prices within unsuccessful proposals are protected from disclosure pursuant to 10 USC § 2305(g).

Request widest dissemination possible.

  
H. G. McIntyre  
Director

Attachments:

U.S. Department of Justice Memorandum, February 24, 2000, "Unit Price FOIA Officers Conference"

OASD (PA) Memorandum, February 8, 1998, "Release of Unit Prices in Awarded Contracts," with Attachments



PUBLIC AFFAIRS

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE  
1400 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1400



FEB 02 1998

Ref: 97-CORR-136

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Release of Unit Prices in Awarded Contracts

The attached extract from the Federal Register indicates that after award of a contract, the government must provide to unsuccessful bidders certain information concerning the successful bidder and the contract. This information includes unit prices, among other items, contained in each award. The reference from the Federal Register is a change to the Federal Acquisition Regulation (FAR), Part 15. This change to the FAR is not a change to DoD Freedom of Information Act (FOIA) policy.

This change to the FAR removes any potential confusion about unit prices; they are not proprietary information after contract award, and accordingly cannot be withheld from disclosure under the FOIA by exemption (b)(4). Concerning FOIA requests for contracts awarded on solicitations issued on or after January 1, 1998, submitter notification is not required for the release of unit prices or other items indicated in the change to the FAR. However, submitters should still be notified concerning this information contained in contracts awarded on solicitations issued prior to January 1, 1998, and for other submitter information contained in all contracts. Also, please remember that prior to contract award, unit prices shall be withheld under 41 USC 423, Procurement Integrity Act. Additionally, after contract award unit prices contained in unsuccessful proposals shall be protected along with the proposal from disclosure pursuant to 10 USC § 2305(g).

Also attached for your information is a copy of Department of Justice guidance regarding this matter. Please pass this information on to your components.

  
A. H. Passarella

Director  
Freedom of Information  
and Security Review

Attachments:  
As stated





U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

February 24, 2000

Unit Price FOIA Officers Conference

Issue: Dealing with requests for unit prices after McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999).

1. As a reverse FOIA case, decided under the APA, McDonnell Douglas is necessarily a "case-specific, record-specific" case; the decision does not set forth a new rule of law or categorical nondisclosure principle. (The denial of rehearing further supports this.)

2. Although the Solicitor General decided against seeking certiorari, he did so recognizing that this issue warrants further judicial review in a future case in which the government could expect a better outcome with another panel.

3. The only way in which this issue can be preserved for future appellate review is for agencies to consistently hold to the position of disclosing unit prices upon a determination that their release would not cause competitive harm.

4. Accordingly, agencies must take special care in compiling their administrative records and be sure to restate, carefully evaluate, and address all submitter objections to disclosure.

5. The reasoning that agencies should use is as follows:

a. For all contracts subject to the revised FAR Part 15, agencies should rely on the FAR as mandatory authority to disclose unit prices. In such cases, in accordance with the FAR, no submitter notice ordinarily is given in the first place.

b. For any contracts not subject to the revised FAR provision, agencies should deal with a submitter's reliance upon McDonnell Douglas as follows:

i. Issue 1 (competitors underbidding): Agencies should analyze this argument as they have always done, looking to see whether in fact it is likely that a competitor could ascertain from the unit prices any proprietary information (such as profit, or actual costs, etc.) that would permit underbidding. Agencies can rely on the reasoning and precedent of the Fourth and Ninth Circuits in Acumenics and Pacific Architects, which upheld agency determinations that no underbidding harm is

possible based on release of unit prices. By contrast, the McDonnell Douglas decision contains no analysis of this issue whatsoever; rather, it simply rejects NASA's response out of hand.

ii. Issue 2 (customers "ratcheting down"):  
Although appellate law on this issue is sparse, there is a clear conflict within the D.C. Circuit on it. Both Public Citizen and CNA emphasized that "[t]he important point for competitive harm in the FOIA context . . . is that it be limited to harm flowing from the affirmative use of proprietary information by competitors." McDonnell Douglas did not overrule or reject these holdings, it simply ignored them. Indeed, courts previously interpreting this prong of National Parks have articulated the standard as whether disclosure is likely to cause substantial competitive harm, as opposed to any other sort of economic harm. Agencies faced with this argument should reject it based on the uniform judicial articulation of this standard (prior to McDonnell Douglas), as it has been specifically applied in Public Citizen and CNA.



(7) Enter appropriate cost elements. When residual inventory exists, the final costs established under fixed-price-incentive and fixed-price-redeterminable arrangements should be net of the fair market value of such inventory. In support of subcontract costs, submit a listing of all subcontracts subject to repricing action, annotated as to their status.

(8) Enter all costs incurred under the contract before starting production and other nonrecurring costs (usually referred to as startup costs) from your books and records as of the cutoff date. These include such costs as preproduction engineering, special plant rearrangement, training program, and any identifiable nonrecurring costs such as initial rework, spoilage, pilot runs, etc. In the event the amounts are not segregated in or otherwise available from your records, enter in this column your best estimates. Explain the basis for each estimate and how the costs are charged on your accounting records (e.g., included in production costs as direct engineering labor, charged to manufacturing overhead). Also show how the costs would be allocated to the units at their various stages of contract completion.

(9) Enter in Column (9) the production costs from your books and records (exclusive of preproduction costs reported in Column (8)) of the units completed as of the cutoff date.

(10) Enter in Column (10) the costs of work in process as determined from your records or inventories at the cutoff date. When the amounts for work in process are not available in your records but reliable estimates for them can be made, enter the estimated amounts in Column (10) and enter in Column (9) the differences between the total incurred costs (exclusive of preproduction costs) as of the cutoff date and these estimates. Explain the basis for the estimates, including identification of any provision for experienced or anticipated allowances, such as shrinkage, rework, design changes, etc. Furnish experienced unit or lot costs (or labor hours) from inception of contract to the cutoff date, improvement curves, and any other available production cost history pertaining to the item(s) to which your proposal relates.

(11) Enter total incurred costs (Total of Columns (8), (9), and (10)).

(12) Enter those necessary and reasonable costs that in your judgment will properly be incurred in completing the remaining work to be performed under the contract with respect to the item(s) to which your proposal relates.

(13) Enter total estimated cost (Total of Columns (11) and (12)).

(14) Identify the attachment in which the information supporting the specific cost element may be found. (Attach separate pages as necessary.)

#### Subpart 15.5—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

##### 15.501 Definition.

*Day*, as used in this subpart, has the meaning set forth at 33.101.

##### 15.502 Applicability.

This subpart applies to competitive proposals, as described in 6.102(b), and a combination of competitive procedures, as described in 6.102(c). The procedures in 15.504, 15.506, 15.507, 15.508, and 15.509, with reasonable modification, should be followed for sole source acquisitions and acquisitions described in 6.102(d)(1) and (2).

##### 15.503 Notifications to unsuccessful offerors.

(a) *Preaward notices*—(1) *Preaward notices of exclusion from competitive range*. The contracting officer shall notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice shall state the basis for the determination and that a proposal revision will not be considered.

(2) *Preaward notices for small business set-asides*. In addition to the notice in paragraph (a)(1) of this section, when using a small business set-aside (see subpart 19.5), upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall notify each offeror in writing of the name and location of the apparent successful offeror. The notice shall also state that:

(i) The Government will not consider subsequent revisions of the offeror's proposal; and

(ii) No response is required unless a basis exists to challenge the small business size status of the apparent successful offeror. The notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay or when the contract is entered into under the 6(a) program (see 19.503-2).

(b) *Postaward notices*—(1) Within 3 days after the date of contract award, the contracting officer shall provide written notification to each offeror whose proposal was in the competitive range but was not selected for award (10 U.S.C. 2305(b)(5) and 41 U.S.C. 253b(c)) or had not been previously notified under paragraph (a) of this section. The notice shall include—

(i) The number of offerors solicited;  
(ii) The number of proposals received;  
(iii) The name and address of each offeror receiving an award;  
(iv) The items, quantities, and any stated unit prices of each award. If the number of items or other factors makes listing any stated unit prices impracticable at that time, only the total contract price need be furnished in the notice. However, the items, quantities, and any stated unit prices of each award shall be made publicly available, upon request; and

(v) In general terms, the reason(s) the offeror's proposal was not accepted, unless the price information in paragraph (b)(1)(iv) of this section readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

(2) Upon request, the contracting officer shall furnish the information described in paragraph (b)(1) of this section to unsuccessful offerors in solicitations using simplified acquisition procedures in part 13.

(3) Upon request, the contracting officer shall provide the information in paragraph (b)(1) of this section to unsuccessful offerors that received a preaward notice of exclusion from the competitive range.

##### 15.504 Award to successful offeror.

The contracting officer shall award a contract to the successful offeror by furnishing the executed contract or other notice of the award to that offeror.

(a) If the award document includes information that is different than the latest signed proposal, as amended by the offeror's written correspondence, both the offeror and the contracting officer shall sign the contract award.

(b) When an award is made to an offeror for less than all of the items that may be awarded and additional items are being withheld for subsequent award, each notice shall state that the Government may make subsequent awards on those additional items within the proposal acceptance period.

(c) If the Optional Form (OF) 307, Contract Award, Standard Form (SF) 28, Award/Contract, or SF 33, Solicitation Offer and Award, is not used to award the contract, the first page of the award document shall contain the Government's acceptance statement from Block 15 of that form, exclusive of the item 3 reference language, and shall contain the contracting officer's name, signature, and date. In addition, if the award document includes information



# FOIA UPDATE

## New Disclosure Rule Adopted for Unit Prices

After many years of contentious disputes between agencies and federal contractors over the FOIA disclosability of unit prices in awarded government contracts, the recent rewrite of Part 15 of the Federal Acquisition Regulation (FAR)—the governmentwide regulation that governs agency contracting—should soon put this issue to rest.

On September 30, after public notice and comment, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a final rule revising Part 15 of the FAR. Critical revisions of two sections now make clear that the unit prices of each award are to be disclosed to unsuccessful offerors during the postaward notice and debriefing process and, most significantly, are also to be made publicly available upon request. 62 Fed. Reg. 51,224, 51,254, 51,255 (1997) (to be codified at 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2)).

### Unit Prices Under the FOIA

Part 15 of the FAR has always contained a provision requiring agencies to disclose (with some exceptions) the unit prices of successful offerors to unsuccessful offerors during the postaward notification process for negotiated contracts. See 48 C.F.R. § 15.1003(b)(1)(iv) (1996). Because Exemption 4 protection is vitiated for information that is publicly available, the Justice Department has long advised agencies that the unit prices of successful offerors that are required to be disclosed under the FAR postaward notice process should not be considered to be within the available protection of Exemption 4. See *FOIA Update*, Fall 1984, at 4.

Nevertheless, over the years, numerous "reverse" FOIA cases have been brought by submitters who have challenged agency decisions to disclose unit prices, and agencies have been forced to litigate this issue time and again. The FAR rewrite should remedy that problem.

### Major New FAR Provisions

The newly issued FAR provisions expressly require disclosure of unit prices in both the postaward notice to and debriefing of unsuccessful offerors. Although there is an exception to that requirement for the postaward notice if "the number of items or other factors makes listing any stated unit prices impracticable," the FAR now expressly limits that exception to what is required to be included in the contents of the postaward notice itself. 62 Fed. Reg. at 51,254. Further, an entirely new provision has been added to the FAR to specifically provide that "the items, quantities, and any stated unit prices of each award shall be made

publicly available, upon request." *Id.* Thus, even if it is impracticable to include voluminous unit prices in a postaward notice itself, once such information is requested, the agency now must make it publicly available.

In addition to these changes made to the postaward notice section, the FAR rewrite also changes the section specifying the information that is required to be disclosed during postaward debriefings of offerors. *Id.* at 51,255. The debriefing provision now explicitly provides that during a debriefing the "overall evaluated cost or price (including unit prices)" shall be furnished the debriefed offeror.

Thus, unsuccessful offerors (who frequently request pricing information concerning successful contractors) now will have two distinct avenues open to them to obtain unit price information as part of the contracting process itself—i.e., through the postaward notice or a postaward debriefing. Most significantly, the unsuccessful offeror (or, for that matter, any member of the public) can request such information, and the FAR directs that it shall be made "publicly available." As the D.C. Circuit Court of Appeals has recognized, "[t]o the extent that any data requested under [the] FOIA are in the public domain, the submitter is unable to make any claim to confidentiality—a *sine qua non* of Exemption 4." *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987).

### No Submitter Notice Necessary

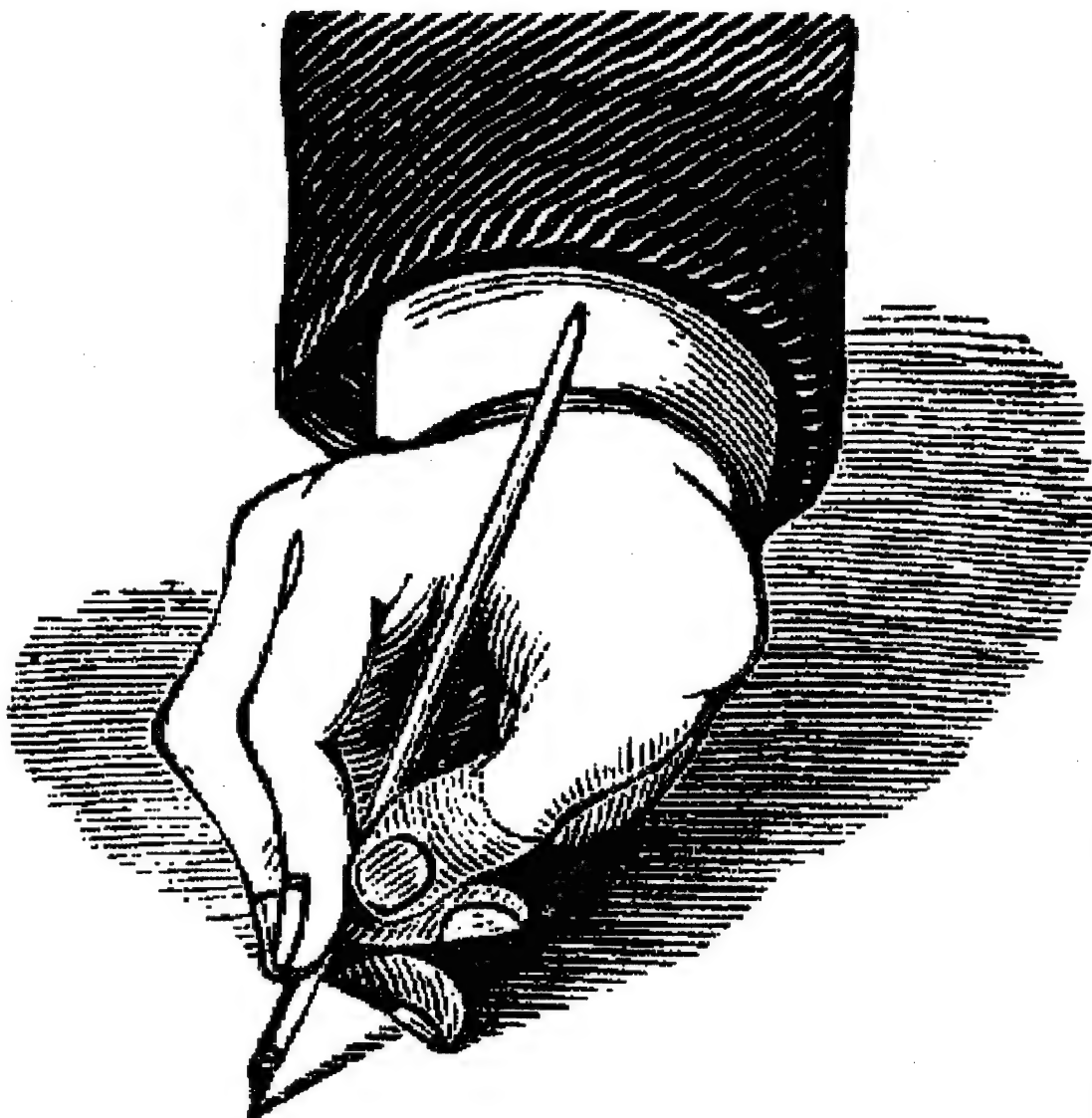
As a result of the FAR's new express authorization to publicly release "items, quantities, and any stated unit prices of each award" upon request, agencies will no longer have to go through the oftentimes-cumbersome process of giving submitter notice prior to disclosing unit prices in response to a FOIA request. Exec. Order No. 12,600, § 8(b). Since public disclosure of awarded unit prices will now be a mandatory part of the postaward process, successful offerors will not reasonably be able to argue that their unit prices should be withheld under the FOIA, because those prices no longer could possibly be considered "confidential."

These new FAR provisions (which were developed by OIP Senior Counsel Melanie Ann Pustay) become mandatory for contracts solicited after January 1, 1998, regarding which submitter notice will no longer be required.

This issue of *FOIA Update* contains a cumulative index covering Volumes I through XVIII of its publication, from 1979 through 1997.

# *Chapter 20*

## **Contract Changes**



*146th Contract Attorneys Course*

## CHAPTER 20

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## CHAPTER 20

### CONTRACT CHANGES

**I. INTRODUCTION.** Following this instruction, the student will understand:

- A. How to analyze change issues arising in government contracts.
- B. How to make formal changes to government contracts.
- C. How to recognize constructive changes in government contracts, and to resolve constructive change issues.

**II. FORMAL CONTRACT CHANGES.**

A. Types of Formal Changes.

- 1. Administrative change. A unilateral written change that does not affect the substantive rights of the parties. FAR 43.101. Example: a change in paying office or a change in telephone number for an agency point of contact.
- 2. Change order. A unilateral, written order, signed by the contracting officer, directing the contractor to make a change that a Changes clause authorizes, with or without the contractor's consent. FAR 43.101.
- 3. Bilateral modification (supplemental agreement). A contract modification signed by the contractor and the contracting officer. FAR 43.103(a). Bilateral modifications are used for:
  - a. Negotiating equitable adjustments that result from the issuance of a change order;
  - b. Definitizing a letter contract; and

- c. Reflecting other agreements of the parties affecting the terms of a contract.

B. Modifying a Contract.

1. Only contracting officers acting within the scope of their authority may execute contract modifications. FAR 43.102; Daly Constr., Inc., ASBCA No. 34322, 92-1 BCA ¶ 24,469; Commercial Contractors, Inc., ASBCA No. 30675, 88-3 BCA ¶ 20,877.
2. Contracting officers should issue modifications on SF 30, Amendment of Solicitation/Modification of Contract. FAR 43.102; FAR 43.301. See Appendix D; Staff, Inc., AGBCA Nos. 96-112-1, 96-159-1, 97-2 BCA ¶ 29,285 (oral modifications are unenforceable); Texas Instr., Inc. v. United States, 922 F.2d 810 (Fed. Cir. 1990); Daly Constr., Inc., ASBCA No. 34322, 92-1 BCA ¶ 24,469. But see Robinson Contracting Co. v. United States, 16 Cl. Ct. 676 (1989) (SF 30 **not** required).
3. The contracting officer must price modifications before executing them if this can be done without adversely affecting the interests of the government. If the price cannot be negotiated prior to execution, negotiate a maximum price. FAR 43.102(b).
4. The contracting officer may order a change at any time prior to final payment. Final payment means payment in the full amount of the contract balance owed, received, and accepted by the contractor after delivery of supplies or the performance of services, with the understanding that no further payments are due. Design & Prod., Inc. v. United States, 18 Cl. Ct. 168 (1989); Gulf & Western Indus., Inc. v. United States, 6 Cl. Ct. 742 (1984).

C. Prerequisites for Formal Changes.

1. The government must receive a benefit. G. Issaias & Co. (Kenya), ASBCA No. 30359, 88-1 BCA ¶ 20,441.
2. Proper funds must be available. FAR 43.105; DFAS-IN Reg. 37-1, tbl. 9-7; AFI 65-601, vol. I, chap. 6.



- a. If a change is within the scope of the contract and is not in response to new or amended requirement, obligate funds available at the time of contract award. Memorandum, Dept. of the Army Office of General Counsel, subject: Antecedent Liabilities (4 Oct. 2000); Obligations and Charges Under Small Business Administration Service Contracts, B-198574, 60 Comp. Gen. 219 (1981).
- b. A change outside the scope of the contract is a new acquisition. Obligate funds current when the contracting officer executes the modification. Modification to Contract Involving Cost Underrun, B-257617, 1995 U.S. Comp. Gen. LEXIS 258 (Apr. 18, 1995). Similarly, if a change is within the scope of the contract but is in response to new or amended requirements, obligate funds that are current when executing a modification. Memorandum, Dept. of the Army Office of General Counsel, subject: Antecedent Liabilities (4 Oct. 2000) (indicating that changes that add capability, expand performance or otherwise modify an item's form, fit, or function will require current funds).

### III. CHANGES CLAUSE COVERAGE.

- A. Purpose of the Clause.
- B. Limitations.
  - 1. The change must be of a type specified in the Changes clause.
  - 2. The change must be within the general scope of the contract.
- C. Scope Determinations.

1. In a protest action, the test used by the GAO is whether the change so materially altered the contract that the field of competition for the contract as modified would be significantly different from that obtained for the original contract (scope of competition). AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993) (holding a modification falls within the scope of the original procurement if potential offerors would have reasonably anticipated such prior to initial award); Phoenix Air Group, Inc. v. U.S., 46 Fed. Cl. 90 (2000); L-3 Communications Aviation Recorders, B-281114, Dec. 28, 1998, 99-1 CPD ¶ 18; Neil R. Gross & Co., B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212.
2. In Neil R. Gross & Co., the GAO considered the following factors in determining the materiality of a modification:
  - a. The extent of any changes in the type of work or the performance period, or the difference in costs between the contract as awarded and as modified;
  - b. Whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes that actually occurred; and
  - c. Whether the modification was of a nature that potential offerors reasonably would have anticipated under the Changes clause.
3. In a contract dispute, the test used by courts and boards is whether the contract, as modified, "should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into." Freund v. United States, 260 U.S. 60 (1922); Edward R. Marden Corp. v. United States, 442 F.2d 364 (Ct. Cl. 1971); Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969).

D. Scope Determination Factors.

1. Changes in the Function of the Item or the Type of Work.

- a. In determining the materiality of a change, the most important factor to consider is the extent to which a product or service, as changed, differs from the requirements of the original contract. See E. L. Hamm & Assocs., Inc., ASBCA No. 43792, 94-2 BCA ¶ 26,724 (change from lease to lease/purchase was out-of-scope); Matter of: Makro Janitorial Services, Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (task order for housekeeping outside scope of an IDIQ contract for preventive maintenance); Hughes Space and Communications Co., B-276040, May 2, 1997, 97-1 CBD ¶ 158; Aragona Constr. Co. v. United States, 165 Ct. Cl. 382 (1964).
- b. Substantial changes in the work may be in-scope if the parties entered into a broadly conceived contract. AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201 (Fed. Cir. 1993) (more latitude allowed where the activity requires a state-of-the-art product); Paragon Systems, Inc., B-284694.2, Jul. 5, 2000, 2000 U.S. Comp. Gen. LEXIS 101 (contract awarded for broad range of services given wide latitude when issuing a task order); General Dynamics Corp. v. United States, 585 F.2d 457 (Ct. Cl. 1978).
- c. An agency's preaward statements that certain work was outside the scope of the contract can bind the agency if it later attempts to modify the contract to include the work. Octel Communications Corp. v. Gen. Servs. Admin., GSBICA No. 12795-P, 95-1 BCA ¶ 27,315.

## 2. Changes in Quantity.

- a. Increases and decreases in the quantity of major items or portions of the work are not "within the scope" of a contract. See, e.g., Liebert Corp., B-232234.5, Apr. 29, 1991, 91-1 CPD ¶ 413 (order in excess of maximum quantity was a material change). But see Master Security, Inc., B-274990, Jan. 14, 1997, 97-1 CPD ¶ 21 (tripling the number of work sites not out-of-scope change); Caltech Serv. Corp., B-240726.6, Jan. 22, 1992, 92-1 CPD ¶ 94 (increase in cargo tonnage on containerization requirements contract was within scope). Generally, increases are new procurements, and decreases are partial terminations for convenience. Cf. Lucas Aul, Inc., ASBCA No. 37803, 91-1 BCA ¶ 23,609 (order was deductive change, not partial termination).

- b. Generally, the Changes clause permits increases and decreases in the quantity of minor items or portions of the work unless the variation alters the entire bargain. See Symbolic Displays, Inc., B-182247, May 6, 1975, 75-1 CPD ¶ 278 (addition of strobe lights to aircraft manufacturing contract was not an “evident” out-of-scope change). Cf. Lucas Aul, Inc., *supra*. See also Kentucky Bldg. Maint., Inc., ASBCA No. 50,535, 98-2 BCA ¶ 29,846 (holding that agency clause that supplements the standard Changes clause was not illegal).

3. Number and Cost of Changes.

- a. Neither the number nor the cost of changes, alone, dictates whether modifications are beyond the scope of a contract. Triax Co. v. United States, 28 Fed. Cl. 733 (1993); Reliance Ins. Co. v. United States, 20 Cl. Ct. 715 (1990), *aff’d*, 931 F.2d 863 (Fed. Cir. 1991) (over 200 changes still held to be within scope); Coates Industrial Piping, Inc., VABCA No. 5412, 99-2 BCA ¶ 30,479; Combined Arms Training Systems, Inc., ASBCA Nos. 44822, 47454, 96-2 BCA ¶ 28,617; Bruce-Andersen Co., ASBCA No. 35791, 89-2 BCA ¶ 21,871.
- b. However, the cumulative effect of a large number of changes is controlling. Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969) (dispute involving over 1,000 changes sent back for trial on merits); PCL Construction Services, Inc. v. United States, 47 Fed. Cl. 745 (Fed. Cl. 2000) (Series of contract modifications did not constitute cardinal change).

4. Changes in Time of Performance.

- a. The supply Changes clause does not authorize unilateral acceleration of performance. FAR 52.243-1; see Appendix A.
- b. Under the services Changes clause, the contracting officer unilaterally may change “when” a contractor is to perform but not the overall performance period. FAR 52.243-1, Alternate I; see Appendix B.
- c. The construction Changes clause authorizes unilateral acceleration of performance. FAR 52.243-4(a)(4); see Appendix C.

- d. Granting a contractor additional time to perform will normally be considered within scope. Saratoga Indus., Inc., B-247141, 92-1 CPD ¶ 397.

5. Acceptance of a Change.

- a. If a contractor performs under a change order, it may not argue subsequently that the change constituted a breach of contract. Amerutex Enterprises, Ltd v. United States, 1997 U.S. App. LEXIS 3301 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); Silberblatt & Lasker, Inc. v. United States, 101 Ct. Cl. 54 (1944); C.E. Lowther & Son, ASBCA No. 26760, 85-2 BCA ¶ 18,149. Similarly, once the contractor waives the breach and performs, the Government is obligated to pay for the out-of-scope work. Mac-Well Co., ASBCA No. 23097, 79-2 BCA ¶ 13,895.
- b. Agreeing to a change does not convert an out-of-scope change into one that is within the scope of the contract for competition purposes; it simply means that the parties have agreed to process the change under the Changes clause. The contracting officer may not use modifications to avoid the statutory mandate for competition. Corbin Superior Composites, Inc., B-235019, July 20, 1989, 89-2 CPD ¶ 67.

E. The Duty to Continue Performance.

- 1. The Changes and Disputes (Standard) clauses require the contractor to continue performance pending the resolution of a dispute over an **in-scope change**. See FAR 33.213, Obligation to Continue Performance; 52.233-1, Disputes; FAR 52.243-1(e), Changes-Fixed Price.
- 2. Conversely, under the standard Disputes clause, a contractor has no duty to proceed diligently with performance pending resolution of any dispute concerning a change **outside the scope** of the contract (cardinal change). FAR 52.233-1(h). Alliant Techsystems, Inc. v United States, 178 F.3d 1260 (Fed. Cir. 1999); Airprep Technology, Inc. v. United States, 30 Fed. Cl. 488 (1994).

3. Exceptions to the duty to proceed.
  - a. The government withholds progress payments improperly. Sterling Millwrights v. United States, 26 Cl. Ct. 49 (1992); DeKonty Corp., ASBCA No. 32140, 89-2 BCA ¶ 21,586.
  - b. Continued performance is impractical. United States v. Spearin, 248 U.S. 132 (1918) (government refused to provide safe working conditions); Xplo Corp., DOT BCA No. 1289, 86-3 BCA ¶ 19,125.
  - c. The government fails to provide clear direction to the contractor. James W. Sprayberry Constr., IBCA No. 2130, 87-1 BCA ¶ 19,645 (contractor justified to await clarification of defective specifications). Cf. Starghill Alternative Energy Corp., ASBCA Nos. 49612, 49732, 98-1 BCA ¶ 29,708 (a one-month Government delay in executing modification did not excuse contractor from proceeding).
4. The Alternate Disputes clause requires the contractor to continue to perform even if the government orders a cardinal change, or otherwise breaches the contract. See FAR 52.233-1, Alternate I; DFARS 233.214.

#### IV. OVERVIEW OF CONSTRUCTIVE CHANGES.

- A. Elements of a Constructive Change. The Sherman R. Smoot Corp., ASBCA Nos. 52173, 53049, 2001 ASBCA LEXIS 13; Green's Multi-Services, Inc., EBCA No. C-9611207, 97-1 BCA ¶ 28,649; Dan G. Trawick III, ASBCA No. 36260, 90-3 BCA ¶ 23,222.
  1. A change occurred either as the result of government action or inaction. Kos Kam, Inc., ASBCA No. 34682, 92-1 BCA ¶ 24,546;
  2. The contractor did not perform voluntarily. Jowett, Inc., ASBCA No. 47364, 94-3 BCA ¶ 27,110; and

3. The change resulted in an increase (or a decrease) in the cost or the time of performance. Advanced Mechanical Servs., Inc., ASBCA No. 38832, 94-3 BCA ¶ 26,964.

B. Types of Constructive Changes.

1. Contract misinterpretation by the government;
2. Defective specifications;
3. Interference and failure to cooperate;
4. Failure to disclose vital information (superior knowledge); and
5. Constructive acceleration.

V. **CONTRACT INTERPRETATION PRINCIPLES.**

A. Main Issues. Ralph C. Nash, Jr., Government Contract Changes, 11-2 (2d ed. 1989).

1. Did the government's interpretation originate from an employee with authority? See J.F. Allen Co. & Wiley W. Jackson Co., a Joint Venture v. United States, 25 Cl. Ct. 312 (1992).
2. Did the contractor perform work that the contract did not require?
3. Did the contractor timely notify the government of the impact of the government's interpretation?

B. Contract Interpretation Process.

1. A judge must interpret a contract when the parties do not agree on the meaning of its terms. Fruin-Colon Corp. v. United States, 912 F.2d 1426 (Fed. Cir. 1990).

2. Framework for analyzing contract interpretation issues.
  - a. Seek the intent of the parties by examining:
    - (1) The language of the contract; and/or
    - (2) The facts and circumstances surrounding contract formation and performance.
  - b. If this process fails to reveal the objective intent of the parties, apply the two rules of risk allocation: contra proferentem and the duty to seek clarification.
3. The contractor must continue performance even if it does not agree with the contracting officer's interpretation, absent a material breach. See FAR 52.233-1, Disputes; Aero Prods. Co., ASBCA No. 44030, 93-2 BCA ¶ 25,868.

C. Intrinsic Evidence of Intent.

1. In determining the objective intent of the parties, first examine the terms of the contract. See, e.g., U.S. Eagle, Inc., ASBCA No. 41093, 92-1 BCA ¶ 24,371.
2. Interpret the contract as a whole. M.A. Mortenson Co. v. United States, 29 Fed. Cl. 82 (1993) (courts must give reasonable meaning to all parts of the contract and not render any portions of the contract meaningless); Hol-Gar Mfg. Corp. v. United States, 351 F.2d 972 (Ct. Cl. 1965); Bay Ship & Yacht Company, DOT BCA No. 2913, 96-1 BCA ¶ 28,236 (contract must be read as a whole, giving reasonable meaning to all its terms); Sheladia Constr. Corp., VABCA No. 3313, 91-3 BCA ¶ 24,111 (contractor may not ignore requirement merely because it is not stated in normal section of the specifications). Oakland Constr. Co., ASBCA No. 43986, 93-2 BCA ¶ 25,867 (prime contractor responsible for omission in bid caused by subcontractor's failure to bid on contract requirement because subcontractors only received portion of specification from prime contractor).



- a. Give effect to all provisions and do not render meaningless any term of the contract. B.D. Click Co. v. United States, 614 F.2d 748 (Ct. Cl. 1980); Jamsar, Inc. v. United States, 442 F.2d 930 (Ct. Cl. 1971); Rex Sys., Inc., ASBCA No. 45874, 94-1 BCA ¶ 26,370; Electronic Genie, Inc., ASBCA No. 40535, 93-1 BCA ¶ 25,307.
  - b. Interpret a contract in harmony with its principal purpose. Maddox Indus. Contractors, Inc., ASBCA No. 36091, 88-3 BCA ¶ 21,037; Restatement (Second) of Contracts § 203(a) (1981).
3. How to define terms.
- a. If contract defines a term, one may not substitute an alternate definition. Sears Petroleum & Transport Corp., ASBCA No. 41401, 94-1 BCA ¶ 26,414.
  - b. Give ordinary terms their plain and ordinary meaning in defining the rights and obligations of the parties. T.E.C. Const. v. VA Medical Center, 33 Fed. Cl. 363 (1995); Elden v. United States, 617 F.2d 254 (Ct. Cl. 1980); Alive & Well International, Inc., ASBCA No. 51850, 00-1 BCA ¶ 30,778 (since contract left the term "discover" undefined, interpret in accordance with the ordinary meaning).
  - c. Give technical terms their technical meanings. Specialized or trade meanings take precedence over "lay" meanings. See Western States Constr. Co. v. United States, 26 Cl. Ct. 818 (1992).
    - (1) Give scientific and engineering terms their recognized technical meanings unless the context or an applicable usage indicates a contrary intention. Tri-Cor, Inc. v. United States, 458 F.2d 112 (Ct. Cl. 1972); Coastal Drydock & Repair Corp., ASBCA No. 31894, 87-1 BCA ¶ 19,618.
    - (2) Similarly, give terms unique to government contracts their technical meanings. General Builders Supply Co. v. United States, 409 F.2d 246 (Ct. Cl. 1969) (meaning of "equitable adjustment").

4. Lists of items.

- a. Lists are presumed exclusive unless qualified. J.A. Jones Const. Co., ENG BCA No. 6164, 95-1 BCA ¶ 27,482; Santa Fe Engr's, Inc., ASBCA No. 48331, 95-1 BCA ¶ 27,505.
- b. Nonexclusive lists are presumed to include only similar, unspecified items. "Words, like men, are known by the company they keep. The meaning of a doubtful word may be ascertained by reference to the meaning of words with which they are associated." C.W. Roberts Constr. Co., ASBCA No. 12348, 68-1 BCA ¶ 6819. See United States v. Turner Constr. Co., 819 F.2d 283 (Fed. Cir. 1987) (unreasonable to include unmentioned item in a list where unmentioned item was most expensive component).

5. Order of precedence.

- a. To resolve inconsistencies, order of precedence clauses establish priorities among different sections of the contract. See, e.g., FAR 52.214-29, Order of Precedence-Sealed Bidding; FAR 52.215-8, Order of Precedence – Uniform Contract Format; FAR 52.236-21, Specifications and Drawings for Construction.
- b. In construction contracts, a contractor may rely on the order of precedence clause to resolve a discrepancy between the specifications and drawings even if a discrepancy is patent or known to the contractor prior to bid submission. Hensel Phelps Constr. Co. v. United States, 886 F.2d 1296 (Fed. Cir. 1989); C Constr. Co., ASBCA No. 38098, 91-2 BCA ¶ 23,923; Hull-Hazard, Inc., ASBCA No. 34645, 90-3 BCA ¶ 23,173. See also Shah Constr. Co. Inc., ASBCA No. 50411, 2001 ASBCA LEXIS 41 (denying Government's contention that the clause could only resolve conflicts within the specifications or within the drawings not conflicts between the specifications and drawings).

- c. Omissions. In construction contracts, the DFARS states that the contractor shall perform omitted details of work that are necessary to carry out the intent of the drawings and specifications or that are performed customarily. DFARS 252.236-7001; M.A. Mortenson Co., ASBCA No. 50383, 00-2 BCA ¶ 30,936 (holding that contractor should have known elevator would require rail support columns despite their omission from drawings); Single Ply Sys., Inc., ASBCA No. 42168, 91-2 BCA ¶ 24,032; Hull-Hazard, Inc., supra.

D. Extrinsic Evidence of Intent.

- 1. Do not consider extrinsic evidence if the contract terms are clear. See C. Sanchez & Son, Inc. v. United States, 24 Cl. Ct. 14 (1991), rev'd on other grounds, 6 F.3d 1539 (Fed. Cir. 1993); Skyline Technical Construction Services, ASBCA No. 51076, 98-2 BCA ¶ 29,888 (since contract was clear, no extrinsic evidence allowed).
- .2. Preaward communications.
  - a. The Explanation to Prospective Offerors clause does not prevent parties from using clarifying statements by "authorized" officials to interpret an ambiguous provision. FAR 52.214-6 (sealed bidding); FAR 52.215-14 (negotiations); Max Drill, Inc. v. United States, 192 Ct. Cl. 608, 427 F.2d 1233 (1970); Turner Constr. Co. v. Gen. Servs. Admin., GSBCA No. 11361, 92-3 BCA ¶ 25,115 (contractor could not rely on preaward statement that was inconsistent with terms of solicitation); Community Heating & Plumbing Co., ASBCA No. 37981, 92-2 BCA ¶ 24,870.
  - b. Statements made at pre-bid conferences may bind the government. Cessna Aircraft Co., ASBCA No. 48118, 95-2 BCA ¶ 27,560; General Atronics Corp., ASBCA No. 46784, 94-3 BCA ¶ 27,112. Cf. Orbas & Assoc., ASBCA No. 33359, 87-2 BCA ¶ 19,742 (contractor who did not attend pre-bid conference was not bound by explanation of provision where solicitation should have explained provision).
  - c. Preaward acceptance of contractor's cost-cutting suggestion was binding on the government. See Pioneer Enters., Inc., ASBCA No. 43739, 93-1 BCA ¶ 25,395.

3. Actions during contract performance. The way in which the parties comport themselves often reveals the intent of the parties. Courts and boards afford these actions great weight when determining the meaning of a provision. Drytech, Inc., ASBCA No. 41152, 92-2 BCA ¶ 24,809; Macke Co. v. United States, 467 F.2d 1323 (Ct. Cl. 1972).
4. Prior course of dealing.
  - a. To determine the meaning of the current contract, consider a prior course of dealing between the parties in earlier contracts. Superstaff, Inc., ASBCA No. 46112, 94-1 BCA ¶ 26,574; American Transp. Line, Ltd., ASBCA No. 44510, 93-3 BCA ¶ 26,156; L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969).
  - b. The parties must be aware of the prior course of dealing. Gresham & Co. v. United States, 470 F.2d 542 (Ct. Cl. 1972); T. L. Roof & Assocs., ASBCA No. 38928; 93-2 BCA ¶ 25,895; Snowbird Indus., ASBCA No. 33027, 89-3 BCA ¶ 22,065.
  - c. Prior waivers of specifications must be numerous or consistent to vary an unambiguous term. Doyle Shirt Mfg. Corp., 462 F.2d 1150 (Ct. Cl. 1972); Cape Romain Contractors, Inc., ASBCA Nos. 50557, 52282, 00-1 BCA ¶ 30,697 (one waiver does not establish a course of dealing); Kvaas Constr. Co., ASBCA No. 45965, 94-1 BCA ¶ 26,513 (four waivers not enough); General Sec. Servs. Corp. v. General Servs. Admin., GSBGA No. 11381, 92-2 BCA ¶ 24,897 (no waiver based on waivers in six previous contracts because GSA sought to enforce requirement in current contract).
5. Custom or trade usage/industry standard.
  - a. Parties may not use custom and trade usage to contradict unambiguous terms. WRB Corp. v. United States, 183 Ct. Cl. 409, 436 (1968); C. Sanchez & Son, Inc., *supra*; All Star / SAB Pacific, J.V., ASBCA No. 50856, 99-1 BCA ¶ 30,214; Riley Stoker Corp., ASBCA No. 37019, 92-3 BCA ¶ 25,143 (contract terms were ambiguous); Harold Bailey Painting Co., ASBCA No. 27064, 87-1 BCA ¶ 19,601 (used to define "spot painting").

- b. Parties may resort to custom and trade usage to explain or define unambiguous terms. W.G. Cornell Co. v. United States, 376 F.2d 299 (Ct. Cl. 1967).
- c. Parties also may use an industry standard or trade usage to show that a term is ambiguous. See Gholson, Byars, & Holmes Constr. Co. v. United States, 351 F.2d 987 (Ct. Cl. 1965); Western States Constr. Co. v. United States, 26 Cl. Ct. 818 (1992); Metric Constructors, Inc. v. National Aeronautics and Space Administration, 169 F.3d 747 (Fed. Cir. 1999) (contractor reasonably relied on trade practice and custom to show that the specifications were susceptible to different interpretations).
- d. The party asserting the industry standard or trade usage bears the burden of proving the existence of the standard or usage. Roxco, Ltd., ENG BCA No. 6435, 00-1 BCA ¶ 30,687; DWS, Inc., Debtor in Possession, ASBCA No. 29743, 93-1 BCA ¶ 25,404.

E. Allocation of Risk for Ambiguous Language.

If a contract is susceptible to more than one reasonable interpretation after application of the aforementioned rules, it contains an ambiguity. GPA-I, LP v. Unites States, 46 Fed. Cl. 762 (2000); Metric Constructors, Inc. v. NASA, 169 F.3d 747 (Fed. Cir. 1999). It is then necessary to apply risk allocation principles to determine which party is ultimately responsible. The risk allocation principles do not apply to ambiguities in procurement regulations. Santa Fe Eng'rs, Inc. v. United States, 801 F.2d 379 (Fed. Cir. 1986).

- 1. Contra proferentem. Peter Kiewit Sons' Co. v. United States, 109 Ct. Cl. 390 (1947).
  - a. If one cannot resolve an ambiguity under the contract interpretation rules, construe the ambiguity against the drafter. Emerald Maint., Inc., ASBCA No. 33153, 87-2 BCA ¶ 19,907; WPC Enter. v. United States, 323 F.2d 874 (Ct. Cl. 1963).

- b. “[Contra proferentem] puts the risk of ambiguity, lack of clarity, and absence of proper warning on the drafting party which could have forestalled the controversy; it pushes the drafters toward improving contractual forms; and it saves contractors from hidden traps not of their own making.” Sturm v. United States, 421 F.2d 723 (Ct. Cl. 1970).
- c. Elements of the rule.
- (1) To recover, the contractor’s interpretation must be reasonable. Teague Brothers Transfer & Storage Co., Inc., ASBCA Nos. 6312, 6313, 98-1 BCA ¶ 29,333 (the board decided that the contractor’s interpretation of the latent ambiguity was reasonable); J.C.N. Constr. Co., ASBCA No. 42263, 91-3 BCA ¶ 24,095 (contractor interpretation unreasonable);
  - (2) The opposing party must be the drafter. This is usually the government, but a contractor may also be the drafter. See Canadian Commercial Corp. v. United States, 202 Ct. Cl. 65 (1973); TRW, Inc., ASBCA No. 27299, 87-3 BCA ¶ 19,964; Prince George Ctr., Inc. v. Gen. Servs. Admin., GSBGA No. 12289, 94-2 BCA ¶ 26,889; and
  - (3) The non-drafting party must have detrimentally relied on its interpretation in submitting its bid. Fruin-Colon Corp. v. United States, 912 F.2d 1426 (Fed. Cir. 1990); National Medical Staffing, Inc., ASBCA No. 45046, 96-2 BCA ¶ 28,483 (for contra proferentem to apply, the contractor must demonstrate that it relied upon the interpretation in submitting its bid, not merely that it relied during performance); Food Servs., Inc., ASBCA No. 46176, 95-2 BCA ¶ 27,892.

2. Duty to seek clarification. Do not apply contra proferentem if an ambiguity is patent or glaring and the contractor failed to seek clarification. See Triax Pacific, Inc. v. West, 130 F.3d 1469 (Fed. Cir. 1997) (holding that contractor should have recognized the patent ambiguity and sought clarification before submitting its bid). See also Hensel Phelps Constructions., Co., ASBCA No. 49716, 00-2 BCA ¶ 30,925 (holding that an objective standard applied to the latent/patent ambiguity determination); Community Heating & Plumbing Co. v. Kelso, supra; Gaston & Assocs., Inc. v. United States, 27 Fed. Cl. 243 (1993) (latent ambiguity); Technocratica, ASBCA No. 44134, 94-2 BCA ¶ 26,606; Allen County Builders Supply, ASBCA No. 41836, 93-1 BCA ¶ 25,398; D.E.W., Inc., ASBCA No. 36389, 92-3 BCA ¶ 25,029 (patent ambiguity); Stroh Corp. v. Gen. Servs. Admin., GSBCA No. 11029, 93-2 BCA ¶ 25,841 (latent ambiguity); Foothill Eng'g., IBCA No. 3119-A, 94-2 BCA ¶ 26,732 (the misplacement of a comma in a figure was a latent ambiguity and did not trigger a duty to inquire, because it was not obvious and apparent in the context of a reasonable, but busy, bidder).

## VI. DEFECTIVE SPECIFICATIONS - OVERVIEW.

- A. Theories of Recovery. Courts and boards hold the government liable for defects in specifications based upon:
  1. The implied warranty the government gives for the use of design specifications in a contract.
  2. The principles of impracticability/impossibility of performance when the contractor incurs increased costs while attempting to conform to defective performance specifications.
- B. Causation. This type of constructive change is deemed to have occurred at the time of contract award on the premise that the contracting officer had an immediate duty to issue an order correcting the defective specifications.

## VII. DEFECTIVE SPECIFICATIONS - IMPLIED WARRANTY OF SPECIFICATIONS.

### A. Basis for the Implied Warranty.

1. This "warranty" is based on an implied promise by the government that a contractor can follow the contract drawings and specifications and perform without undue expense. This promise has been called a warranty; however, recovery is based on a breach of the duty to provide drawings and specifications reasonably free from defects. Fru-Con Construction Corp. v. United States, 42 Fed. Cl. 94 (1998); United States v. Spearin, 248 U.S. 132 (1918); Luria Bros. & Co. v. United States, 177 Ct. Cl. 676, 369 F.2d 701 (1966).
2. Defective specifications constitute constructive changes. See, e.g., Hol-Gar Mfg. Corp. v. United States, 175 Ct. Cl. 518, 360 F.2d 634 (1964). In some cases, judges have relied on a breach of contract theory. See e.g., Big Chief Drilling Co. v. United States, 26 Cl. Ct. 1276 (1992).

### B. Specification Types. Aleutian Constr. v. United States, 24 Cl. Ct. 372 (1991); Monitor Plastics Co., ASBCA No. 14447, 72-2 BCA ¶ 9626.

1. **DESIGN SPECIFICATIONS** set forth precise measurements, tolerances, materials, tests, quality control, inspection requirements, and other specific information. See Q.R. Sys. North, Inc., ASBCA No. 39618, 92-2 BCA ¶ 24,793 (specified roofing material inadequate for roof type).
2. **PERFORMANCE SPECIFICATIONS** set forth the operational characteristics desired for the item. In such specifications, design, measurements, and other specific details are neither stated nor considered important as long as the performance requirement is met. See Interwest Constr. v. Brown, 29 F.3d 611 (Fed. Cir. 1994).
3. **PURCHASE DESCRIPTIONS** are specifications that designate a particular manufacturer's model, part number, or product. The phrase "or equal" may accompany a purchase description.



4. **COMPOSITE SPECIFICATIONS** are specifications that are comprised of two or more different specification types. See Defense Systems Company, Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991; Transtechology Corp. v. United States, 22 Cl. Ct. 349 (1990).

C. Scope of Government Liability.

1. The scope of government liability depends on the specification type. Lopez v. A.C. & S., Inc., 858 F.2d 712 (Fed. Cir. 1988); Morrison-Knudsen Co., ASBCA No. 32476, 90-3 BCA ¶ 23,208.
2. Design specifications.
  - a. The key issue is whether the government required the contractor to use detailed specifications. Geo-Con, Inc., ENG BCA No. 5749, 94-1 BCA ¶ 26,359. Nonconformity with design specifications result in reduction in contract price. Donat Gerg haustechnik, ASBCA Nos. 41197, 42001, 2821,47456, 97-2 BCA ¶ 29,272.
  - b. The government is responsible for design and related omissions, errors, and deficiencies in the specifications and drawings. Geo-Con, Inc., *supra*; Neal & Co. v. United States, 19 Cl. Ct. 463 (1990) (defective design specifications found to cause bowing in wall); International Foods Retort Co., ASBCA No. 34954, 92-2 BCA ¶ 24,994 (bland chicken ala king). *But cf.* Hawaiian Bitumuls & Paving v. United States, 26 Cl. Ct. 1234 (1992) (contractor may vitiate warranty by participating in drafting and developing specifications).
3. Performance specifications.
  - a. If the government uses a performance specification, the contractor accepts general responsibility for the design, engineering, and achievement of the performance requirements. Aleutian Constr. v. United States, 24 Cl. Ct. 372 (1991).
  - b. The contractor has discretion as to the details of the work, but the work is subject to the government's right of final inspection and approval or rejection. Kos Kam, Inc., ASBCA No. 34682, 92-1 BCA ¶ 24,546.

4. Purchase descriptions. Monitor Plastics Co., ASBCA No. 14447, 72-2 BCA ¶ 9626.
  - a. If the contractor furnishes or uses in fabrication a specified brand name or an acceptable and approved substitute brand-name product, the responsibility for proper performance generally falls upon the government.
  - b. The government's liability is conditioned upon the contractor's correct use of the product.
  - c. If the contractor elects to manufacture an equal product, it must ensure that the product is equal to the brand name product.

5. Composite specifications.

- a. If the government uses a composite specification, the parties must examine each portion of the specification to determine which specification type caused the problem. This determination establishes the scope of the government's liability. Aleutian Constr. v. United States, 24 Cl. Ct. 372 (1991); Penguin Indus. v. United States, 530 F.2d 934 (Ct. Cl. 1976). Cf. Hardwick Bros. Co., v. United States, 36 Fed. Cl. 347 (Fed. Cl. 1996) (since mixed specifications were primarily performance-based, there is no warranty covering the specifications).
- b. The contractor must isolate the defective element of the design portion or demonstrate affirmatively that its performance did not cause the problem. Defense Systems Co. Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991 (finding that contractor failed to demonstrate deficient fuses were due to deficient Government design rather than production problems).

D. Recovery under the Implied Warranty of Specifications. See Transtechology Corp., supra.

1. To recover under the implied warranty of specifications, the contractor must prove that:

- a. It reasonably relied upon the defective specifications and complied fully with them. Phoenix Control Systems, Inc. v. Babbitt, Secy. of the Interior, 1997 U.S. App. LEXIS 8085 (Fed. Cir. 1997); Al Johnson Constr. Co. v. United States, 854 F.2d 467 (Fed. Cir. 1988); Gulf & Western Precision Eng'g Co. v. United States, 543 F.2d 125 (Ct. Cl. 1976); Mega Constr. Co., 29 Fed. Cl. 396 (1993); Bart Associates, Inc., EBCA No. 9211144, 96-2 BCA ¶ 28,479.
  - b. That the defective specifications caused increased costs. Pioneer Enters., Inc., ASBCA No. 43739, 93-1 BCA ¶ 25,395 (contractor failed to demonstrate that defective specification caused its delay); Chaparral Indus., Inc., ASBCA No. 34396, 91-2 BCA ¶ 23,813, aff'd, 975 F.2d 870 (Fed. Cir. 1992).
2. The contractor cannot recover if it has actual or constructive knowledge of the defects prior to award. Centennial Contractors, Inc., ASBCA No. 46820, 94-1 BCA ¶ 26,511; L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969) (contractor had actual knowledge from prior contract). Generally, constructive knowledge is limited to patent errors because a contractor has no duty to conduct an independent investigation to determine whether the specifications are adequate. Jordan & Nobles Constr. Co., GSBCEA No. 8349, 91-1 BCA ¶ 23,659; John C. Grimberg Co., ASBCA No. 32490, 88-1 BCA ¶ 20,346. Cf. Spiros Vasilatos Painting, ASBCA No. 35065, 88-2 BCA ¶ 20,558.
3. A contractor may not recover if it decides unilaterally to perform work knowing that the specifications were defective. Ordnance Research, Inc. v. United States, 221 Ct. Cl. 641, 609 F.2d 462 (1979).
4. A contractor may not recover if it fails to give timely notice that it was experiencing problems without assistance of the government. JGB Enterprises, Inc., ASBCA No. 49, 493, Aug. 20, 1996, 96-2 BCA ¶ 28,498.
5. The government may disclaim this warranty. See, e.g., Service Eng'g Co., ASBCA No. 40272, 92-3 BCA ¶ 25,106; Bethlehem Steel Corp., ASBCA No. 13341, 72-1 BCA ¶ 9186.

# **VIII. DEFECTIVE SPECIFICATIONS - IMPRACTICABILITY/IMPOSSIBILITY OF PERFORMANCE.**

**Elements.** Oak Adec, Inc. v. United States, 24 Cl. Ct. 502 (1991); Reflectone, Inc., ASBCA No. 42363, 98-2 BCA ¶ 29,869; Gulf & Western Indus., Inc., ASBCA No. 21090, 87-2 BCA ¶ 19,881.

## A. An unforeseen or unexpected occurrence.

1. A significant increase in work usually caused by unforeseen technological problems. Examine the following factors to determine whether a problem was unforeseen or unexpected:
  - a. The nature of the contract and specifications, i.e., whether they require performance beyond the state of the art;
  - b. The extent of the contractor's effort; and
  - c. The ability of other contractors to meet the specification requirements.
2. In some cases, a contractor must show that an extensive research and development effort was necessary to meet the specifications or that no competent contractor can meet the performance requirements. Hol-Gar Mfg. Corp. v. United States, 360 F.2d 634 (Ct. Cl. 1964); Reflectone, Inc., *supra* (contractor must show specifications "required performance beyond the state of the art" to demonstrate impossibility); Defense Sys. Corp. & Hi-Shear Technology Corp., ASBCA No. 42939, 95-2 BCA ¶ 27,721.

## B. The contractor did not assume the risk of the unforeseen occurrence by agreement or custom. Southern Dredging Co., ENG BCA No 5843, 92-2 BCA ¶ 24,886; Fulton Hauling Corp., PSBCA No. 2778, 92-2 BCA ¶ 24,886.

1. A contractor may assume the risk of the unforeseen effort by using its own specifications. See Bethlehem Corp. v. United States, 462 F.2d 1400 (Ct. Cl. 1972); Costal Indus. v. United States, 32 Fed. Cl. 368 (1994) (use of specification drafted, in part, by contractor's supplier held to be assumption of risk).

2. By proposing to extend the state of the art, a contractor may assume the risk of impossible performance. See J.A. Maurer, Inc. v. United States, 485 F.2d 588 (Ct. Cl. 1973).

C. Performance is commercially impracticable or impossible.

1. The contractor must show that the increased cost of performance is so much greater than anticipated that performance is commercially senseless. See Fulton Hauling Corp., *supra*; Beeston, Inc., ASBCA No. 38969, 91-3 BCA ¶ 24,241. But see SMC Info. Sys., Inc. v. General Servs. Admin., GSBCA No. 9371, 93-1 BCA ¶ 25,485 (the increased difficulty cannot be the result of poor workmanship).
2. There is no universal standard for determining "commercial senselessness."
  - a. Courts and boards sometimes use a "willing buyer" test to determine whether the increased costs render performance commercially senseless. A showing of economic hardship on the contractor is insufficient to demonstrate "commercial senselessness." McElroy Mach. & Mfg. Co. Inc., ASBCA No. 39416, 92-3 BCA ¶ 25,107. The contractor must show that there are no buyers willing to pay the increased cost of production plus a reasonable profit. Ralph C. Nash, Jr., Government Contract Changes, 13-37 to 13-39 (2d ed. 1989).
  - b. Some decisions have stated that it must be "positively unjust" to hold the contractor liable for the increased costs. Southern Dredging Co., *supra*; Gulf & Western Indus., *supra* (70% increase insufficient); HLI Lordship Indus., VABCA No. 1785, 86-3 BCA ¶ 19,182 (200% increase in gold prices insufficient); Xplo Corp., DOT BCA No. 1289, 86-3 BCA ¶ 19,125 (50% increase in costs was sufficient).

## IX. INTERFERENCE AND FAILURE TO COOPERATE.

### A. Theory of Recovery.

1. Contracting activities have an implied obligation to cooperate with their contractors and not to administer the contract in a manner that hinders, delays, or increases the cost of performance. R&B Bewachungsgesellschaft GmbH, ASBCA No. 42213, 91-3 BCA ¶ 24,310; C.M. Lowther, Jr., ASBCA No. 38407, 91-3 BCA ¶ 24,296.
2. Generally a contractor may not recover for "interference" that results from a sovereign act. See Hills Materials Co., ASBCA No. 42410, 92-1 BCA ¶ 24,636, rev'd sub nom., Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992); Orlando Helicopter Airways, Inc. v. Widnall, 51 F.3d 258 (Fed. Cir. 1995) (holding that a criminal investigation of the contractor was a noncompensable sovereign act); Henderson, Inc., DOT BCA No. 2423, 94-2 BCA ¶ 26,728 (limitation on dredging period created implied warranty); R&B Bewachungsgesellschaft GmbH, supra (criminal investigators took action in government's contractual capacity, not sovereign capacity). See also Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953 (Fed. Cir. 1993) (holding that the government may waive sovereign act defense); Oman-Fischbach Int'l, a Joint Venture, ASBCA No. 44195, 00-2 BCA ¶ 31,022 (actions of a separate sovereign were not compensable constructive changes).

### B. Bases for Interference Claims.

1. Overzealous inspection of the contractor's work. The government must act reasonably. WRB Corp. v. United States, 183 Ct. Cl. 409 (1968); Adams v. United States, 175 Ct. Cl. 288, 358 F.2d 986 (1966).
2. Incompetence of government personnel. Harvey C. Jones, Inc., IBCA No. 2070, 90-2 BCA ¶ 22,762.
3. Water seepage or flow caused by the government. See C.M. Lowther, Jr., ASBCA No. 38407, 91-3 BCA ¶ 24,296 (water from malfunctioning sump pump was interference); Caesar Constr., Inc., ASBCA No. 41059, 91-1 BCA ¶ 23,639 (government's failure to remove snow piles which resulted in water seepage constituted a breach of its implied duty not to impede the contractor's performance).

4. Disruptive criminal investigations conducted in the government's contractual capacity. R&B Bewachungsgesellschaft GmbH, supra.

C. Bases for Failure to Cooperate Claims. The government must cooperate with a contractor. See, e.g., Whittaker Electronics Systems v. Dalton, Secy. of the Navy, 124 F.3d 1443 (Fed. Cir. 1997); James Lowe, Inc., ASBCA No. 42026, 92-2 BCA ¶ 24,835; Mit-Con, Inc., ASBCA No. 42916, 92-1 CPD ¶ 24,539. Bases for claims include:

1. Failure to provide assistance necessary for efficient contractor performance. Chris Berg, Inc. v. United States, 197 Ct. Cl. 503, 455 F.2d 1037 (1972) (implied requirement); Durocher Dock & Dredge, Inc., ENG BCA No. 5768, 91-3 BCA ¶ 24,145 (failure to contest sheriff's stop work order was not failure to cooperate); Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶ 26,466; Packard Constr. Corp., ASBCA No. 46082, 94-1 BCA ¶ 26,577; Ingalls Shipbldg. Div., Litton Sys., Inc., ASBCA No. 17717, 76-1 BCA ¶ 11,851 (express requirement).
2. Failure to prevent interference by another contractor. Examine closely the good faith effort of the government to administer the other contract to reduce interference. Stephenson Assocs., Inc., GSBCA No. 6573, 86-3 BCA ¶ 19,071.
3. Failure to provide access to the work site. Summit Contractors, Inc. v. United States, 23 Cl. Ct. 333 (1991) (absent specific warranty, site unavailability must be due to government's fault); Old Dominion Sec., ASBCA No. 40062, 91-3 BCA ¶ 24,173, *recons. denied*, 92-1 BCA ¶ 24,374 (failure to grant security clearances); M.A. Santander Constr., Inc., ASBCA No. 35907, 91-3 BCA ¶ 24,050 (interference excused default); Reliance Enter., ASBCA No. 20808, 76-1 BCA ¶ 11,831.
4. Abuse of discretion in the approval process. When the contract makes the precise manner of performance subject to approval by the contracting officer, the duty of cooperation requires that the government approve the contractor's methods unless approval is detrimental to the government's interest. Ralph C. Nash, Jr., Government Contract Changes 12-7 (2d ed. 1989). Common bases for claims are:

- a. Failure to approve substitute items or components that are equal in quality and performance to the contract requirements. Page Constr. Co., AGBCA No. 92-191-1, 93-3 BCA ¶ 26,060; Bruce-Anderson Co., ASBCA No. 29411, 88-3 BCA ¶ 21,135 (contracting officer gave no explanation for refusal).
- b. Unjustified disapproval of shop drawings or failure to approve within a reasonable time. Vogt Bros. Mfg. Co. v. United States, 160 Ct. Cl. 687 (1963).
- c. Improper failure to approve the substitution or use of a particular subcontractor. Lockheed Martin Tactical Aircraft Systems, ASBCA Nos. 49530, 50057, 00-1 BCA ¶ 30,852, *recon. denied*, 00-2 BCA ¶ 30,930; Manning Elec. & Repair Co. v. United States, 22 Ct. Cl. 240 (1991); Hoel-Steffen Constr. Co. v. United States, 231 Ct. Cl. 128, 684 F.2d 843 (1982); Liles Constr. Co. v. United States, 197 Ct. Cl. 164, 455 F.2d 527 (1972); Richerson Constr., Inc. v. Gen. Servs. Admin., GSBCA No. 11161, 93-1 BCA ¶ 25,239. Cf. FAR 52.236-5, Material and Workmanship.

## **X. FAILURE TO DISCLOSE VITAL INFORMATION (SUPERIOR KNOWLEDGE).**

### **A. Theory.**

1. Part of the government's duty to cooperate with the contractor and not to hinder or interfere with its performance is a duty to disclose vital information of which the contractor is ignorant. See Helene Curtis Indus. v. United States, 312 F.2d 774 (Ct. Cl. 1963); Miller Elevator Co. v. United States, 30 Fed. Cl. 662 (1994); Bradley Const. Inc. v. United States, 30 Fed. Cl. 507 (1994); Maitland Bros., ENG BCA No. 5782, 94-1 BCA ¶ 26,473.
2. Nondisclosure is a change to the contract because the contracting activity should have disclosed the vital information at contract award.

- B. Elements of the Implied Duty to Disclose Vital Information. Hercules, Inc. v. United States, 24 F.3d 188 (Fed. Cir. 1994), *aff'd on other grounds*, 116 S. Ct. 981 (1996); Technical Systems Assoc. Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684.



1. The contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration. Shawn K. Christiansen d/b/a Island Wide Contracting, AGBCA No. 94-200-3, 95-1 BCA ¶ 27,758; Bradley Const., Inc. v. United States, 30 Fed. Cl. 507 (1994) (information must have a direct bearing on the cost or duration of contract performance); Johnson & Son Erector Co., ASBCA No. 23689, 86-2 BCA ¶ 18,931 (amount of interference caused by the nondisclosure is a factor in determining whether the information is vital); Numax Elec., Inc., ASBCA No. 29080, 90-1 BCA ¶ 22,280 (government failed to disclose that all previous contractor had been unable to manufacture in accordance with the specifications); Riverport Indus., Inc., ASBCA No. 30888, 87-2 BCA ¶ 19,876 (government must disclose the history of a procurement if the information is necessary to successful performance).
2. The government was aware the contractor had no knowledge of and had no reason to obtain such information. Hardeman-Monier-Hutcherson v. United States, 198 Ct. Cl. 472, 458 F.2d 1364 (1972); Max Jordan Bauunternehmung v. United States, 10 Cl. Ct. 672 (1986), *aff'd*, 820 F.2d 1208 (Fed. Cir. 1987); GAF Corp. v. United States, 932 F.2d 947 (Fed. Cir. 1991) (government need not inquire into the knowledge of an experienced contractor).
3. The contract specification misled the contractor or did not put it on notice to inquire. Raytheon Co., ASBCA No. 50166, 50987, 2001 ASBCA LEXIS 2 (Government-furnished technical data package and specifications implied no further development would be required, although Government knew this was not possible); Jack L. Olsen, Inc., AGBCA No. 87-345-1, 93-2 BCA ¶ 25,767 (information provided in solicitation excused contractor from further inquiry). There is no breach of the duty to disclose vital information if the government shows that the contractor knew or should have known of the information. H.N. Bailey & Assoc. v. United States, 449 F.2d 376 (Ct. Cl. 1971) (information was general industry knowledge); Benju Corp., ASBCA No. 43648, 97-2 BCA ¶ 29,274 (Government did not have to disclose readily available information); Metal Trades, Inc., ASBCA No. 41643, 91-2 BCA ¶ 23,982; Hydromar Corp. of Del. & Eastern Seaboard v. United States, 25 Cl. Ct. 555 (1992), *aff'd*, 980 F.2d 744 (Fed. Cir. 1992) (undisclosed information reasonably was available to the contractor); Maitland Bros. Co., ENG BCA No. 5782, 94-1 BCA ¶ 26,473 (information in public domain). *See* International Resources, Inc., ASBCA No. 48157, 96-2 BCA ¶ 28,436; Kloke Transfer, ASBCA No. 39602, 91-3 BCA ¶ 24,356 (information not reasonably available); Panamint, Inc., ENG BCA No. 5351, 87-2 BCA ¶ 19,927 (contractor reasonably investigated).

4. The government failed to provide the relevant information. P.J. Maffei Bldg. Wrecking Corp. v. United States, 732 F.2d 913 (Fed. Cir. 1984) (contractor failed to prove government had better information than already disclosed); Bethlehem Corp. v. United States, 462 F.2d 1400 (Ct. Cl. 1972) (knowledge by one government agency is not attributable to another government agency absent some meaningful connection between the agencies); Marine Industries Northwest, Inc., ASBCA No. 51942, 01-1 BCA ¶ 31,201 (contractor failed to demonstrate that Government had superior knowledge).

## **XI. CONSTRUCTIVE ACCELERATION.**

### **A. Theory of Recovery.**

1. If a contractor encounters an excusable delay, it is entitled to an extension of the contract schedule.
2. Constructive acceleration occurs when the contracting officer refuses to recognize a new contract schedule and demands that the contractor complete performance within the original contract period.

### **B. Elements of Constructive Acceleration. Atlantic Dry Dock Corp., ASBCA Nos. 42609, 42610, 42611, 42612, 42613, 42679, 42685, 42686, 44472, 98-2 BCA ¶ 30,025; Trepte Constr. Co., ASBCA No. 28555, 90-1 BCA ¶ 22,595.**

1. The existence of one or more excusable delays;
2. Notice by the contractor to the government of such delay and a request for an extension of time;
3. Failure or refusal by the government to grant the extension request;
4. An express or implied order by the government to accelerate; and
5. Actual acceleration resulting in increased costs.

### **C. Actions That May Lead to Constructive Acceleration.**

1. The government threatens to terminate when the contractor encounters an excusable delay. Intersea Research Corp., IBCA No. 1675, 85-2 BCA ¶ 18,058;
2. The government threatens to assess liquidated damages and refuses to grant a time extension. Norair Eng'g Corp. v. United States, 666 F.2d 546 (Ct. Cl. 1981); or
3. The government delays approval of a request for a time extension. Fishbach & Moore Int'l Corp., ASBCA No. 18146, 77-1 BCA ¶ 12,300, aff'd, 617 F.2d 223 (Ct. Cl. 1980). But see Franklin Pavlov Constr. Co., HUD BCA No. 93-C-13, 94-3 BCA ¶ 27,078 (mere denial of delay request due to lack of information not tantamount to government order to accelerate).

D. Measure of Damages.

1. The contractor's acceleration efforts need not be successful; a reasonable attempt to meet a completion date is sufficient. Unarco Material Handling, PSBCA No. 4100, 00-1 BCA ¶ 30,682; Fermont Div., Dynamics Corp., ASBCA No. 15806, 75-1 BCA ¶ 11,139.
2. The measure of recovery will be the difference between:
  - a. The reasonable costs attributable to acceleration or attempting to accelerate; and
  - b. The lesser costs the contractor reasonably would have incurred absent its acceleration efforts; plus
  - c. A reasonable profit on the above-described difference.
3. Common acceleration costs.
  - a. Increased labor costs;
  - b. Increased material cost due to expedited delivery; and

- c. Loss of efficiency or productivity. A method to compute this cost is to compare the work accomplished per labor hour or dollar during an acceleration period with the work accomplished per labor hour or dollar during a normal period. See Ralph C. Nash, Jr., Government Contract Changes, 18-16 and 18-17 (2d ed. 1989).

## XII. NOTICE REQUIREMENTS.

### A. Notice of an Equitable Adjustment by the Contractor.

1. Formal changes. The standard Changes clauses require the contractor to assert its right to an adjustment within 30 days after receipt of a written change order. Courts and boards, however, do not strictly construe this requirement. A request for an equitable adjustment submitted prior to final payment is timely unless the late notice is prejudicial to the government. Watson, Rice & Co., HUD BCA No. 89-4468-C8, 90-1 BCA ¶ 22,499; SOSA Y Barbera Constrs., S.A., ENG BCA No. PCC-57, 89-2 BCA ¶ 21,754; E.W. Jerdon, Inc., ASBCA No. 32957, 88-2 BCA ¶ 20,729.
2. Constructive Changes. The standard supply and service contract Changes clauses do not prescribe specific periods within which a contractor must seek an adjustment for a constructive change.
  - a. Under the Changes clause for construction contracts, however, a contractor must assert its right to an adjustment within 30 days of notifying the government that it considers a government action to be a change. FAR 52.243-4(b); FAR 52.243-4(e).
  - b. In a construction contract, unless the contractor bases its adjustment on defective specifications, it may not recover costs incurred more than 20 days before notifying the government of a constructive change. FAR 52.243-4(d). But see Martin J. Simko Constr., Inc. v. United States, 11 Cl. Ct. 257 (1986) (government must show late notice was prejudicial).

- c. Requests for equitable adjustments based on constructive changes submitted prior to final payment are timely unless late notice is prejudicial to the government. Martin J. Simko Constr., supra; Technical Food Servs., Inc., ASBCA No. 26808, 83-1 BCA ¶ 16,267.

3. Content of notice for constructive changes. McLamb Upholstery, Inc., ASBCA No. 42112, 91-3 BCA ¶ 24,081.

- a. A contractor must assert a positive, present intent to seek recovery as a matter of legal right.
- b. Written notice is not required, and there is no formal method for asserting an intent to recover. The notice, however, must be more than an ambiguous letter that evidences a differing opinion. Likewise, merely advising the contracting officer of problems is not sufficient notice.

4. Effect of final payment.

- a. Requests for equitable adjustments raised for the first time after final payment are untimely. Design & Prod., Inc. v. United States, 18 Cl. Ct. 168 (1989) (final payment rule predicated on express contractual provisions); Electro-Technology Corp., ASBCA No. 42495, 93-2 BCA ¶ 25,750.
- b. Final payment does not bar claims for equitable adjustments that were pending or of which the government had constructive knowledge at the time of final payment. Gulf & Western Indus., Inc. v. United States, 6 Cl. Ct. 742 (1984); David Grimaldi Co., ASBCA No. 36043, 89-1 BCA ¶ 21,341 (contractor must specifically assert a claim as a matter of right; letter merely presented arguments).

B. Notice of an Equitable Adjustment by the Government.

- 1. The standard Changes clauses do not limit the time within which the government must claim a downward equitable adjustment.

2. The government must assert any claims it has against a contractor within six years from the accrual of the claim, except claims based upon fraud. See 41 U.S.C § 605; FAR 33.206(b).
3. The government must request an equitable adjustment within a reasonable time unless the contract specifies otherwise. In Joseph H. Roberts v. United States, 174 Ct. Cl. 940, 357 F.2d 938 (1966), the court held that to be reasonable, the government must act:
  - a. While the facts supporting the claim are readily available; and
  - b. Before the contractor's position is prejudiced by final settlement with its subcontractors, suppliers, and other creditors.

### **XIII. ANALYZING CHANGES ISSUES.**

- A. Determine whether the contract required "additional" work. If so, then there was no "change" to the contract requirements, and a contract adjustment is unnecessary.
- B. If the government changed the contract requirements, determine whether the new work was within or outside the scope of the contract.
  1. Within-scope change. The contractor may be entitled to relief pursuant to the Changes clause. FAR 52.243-1 (supplies); FAR 52.243-1, Alternate I (services); FAR 52.243-4 (construction). Under the basic equitable adjustment formula, the contractor is entitled to the difference between the reasonable costs of performing the work as changed and the reasonable costs of performing as originally required. American Line Builders, Inc. v. United States, 26 Cl. Ct. 1155 (1992).
  2. Outside-the-scope change (cardinal change). This is a new acquisition and may constitute a breach of contract. Luria Bros. & Co. v. United States, 369 F.2d 701 (Ct. Cl. 1966).

- C. If a change occurred, determine whether the government employee who ordered/caused the change had actual authority to order the change or whether the contractor can overcome the employee's lack of actual authority. J.F. Allen Co. & Wiley W. Jackson Co., a Joint Venture v. United States, 25 Cl. Ct. 312 (1992).
- D. If a change occurred, determine when the change occurred; when the contractor provided, or when the government can be charged with having acquired, notice of the change; and whether the contractor provided timely notice. Determine if untimely notice prejudiced the government.
- E. If a change occurred, determine the effect of the change on the costs incurred or saved by the contractor and on the time required for contract performance. See R.B. Hazard, Inc., ASBCA No. 36136, 91-1 BCA ¶ 23,376 (assuming a change occurred, there was no impact).

#### XIV. CONCLUSION.

- A. Changes issues are the heart of contract administration.
- B. You must understand when formal changes are proper and the proper procedures for making formal changes.
- C. You must understand the various types of constructive changes and the consequences of constructive changes.





**APPENDIX A: CHANGES CLAUSE (SUPPLIES), FAR 52.243-1.**

**CHANGES--FIXED-PRICE (AUG 1987)**

- (a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:
  - (1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
  - (2) Method of shipment or packing.
  - (3) Place of delivery.
- (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.
- (c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.
- (d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.
- (e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.



**APPENDIX B: CHANGES CLAUSE (SERVICES)**  
**FAR 52.243-1, ALTERNATE I.**

**CHANGES--FIXED-PRICE (AUG 1987)**

- (a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:
- (1) Description of services to be performed.
  - (2) Time of performance (i.e., hours of the day, days of the week, etc.).
  - (3) Place of performance of the services.
- (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.
- (c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.
- (d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.
- (e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.



## APPENDIX C: CHANGES CLAUSE (CONSTRUCTION), FAR 52.243-4.

### CHANGES (AUG 1987)

- (a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes--
  - (1) In the specifications (including drawings and designs);
  - (2) In the method or manner of performance of the work;
  - (3) In the Government-furnished facilities, equipment, materials, services, or site;
  - or
  - (4) Directing acceleration in the performance of the work.
- (b) Any other written order or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.
- (c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.
- (d) If any change under this clause causes an increase or decrease in the Contractor's costs of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) above shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.
- (e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.
- (f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.



**APPENDIX D: STANDARD FORM (SF) 30, AMENDMENT OF  
SOLICITATION/MODIFICATION OF CONTRACT.**

<b>AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT</b>				1. CONTRACT ID CODE		PAGE OF PAGES	
2. AMENDMENT/MODIFICATION NO.		3. EFFECTIVE DATE		4. REQUISITION/PURCHASE REQ. NO.		5. PROJECT NO. (If applicable)	
6. ISSUED BY		CODE		7. ADMINISTERED BY (If other than Item 6)		CODE	
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)				(✓)		9A. AMENDMENT OF SOLICITATION NO.	
						9B. DATED (SEE ITEM 11)	
						10A. MODIFICATION OF CONTRACTS/ORDER NO.	
CODE				FACILITY CODE		10B. DATED (SEE ITEM 13)	

### 11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:

(a) By completing Items 8 and 15, and returning \_\_\_\_\_ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

### 13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

- (✓) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
- B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
- C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
- D. OTHER (Specify type of modification and authority)

**E. IMPORTANT:** Contractor ☐ is not, ☐ is required to sign this document and return \_\_\_\_\_ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
(Signature of person authorized to sign)		BY (Signature of Contracting Officer)	



***Chapter 21***  
**Pricing of**  
**Contract Adjustments**



***146th Contract Attorneys Course***

## CHAPTER 21

### PRICING OF CONTRACT ADJUSTMENTS

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## CHAPTER 21

### **PRICING OF CONTRACT ADJUSTMENTS**

#### **I. INTRODUCTION.** Following this block of instruction, students will understand:

- A. The circumstances that entitle a contractor to a contract price adjustment.
- B. The measurement of a price adjustment.
- C. The methods and burden of proving a price adjustment.
- D. The various special items that often comprise a price adjustment.

#### **II. OVERVIEW.**

- A. Entitlement to More Money. There are three circumstances that entitle contractors to more than the original contract price:
  - 1. Equitable adjustment. An equitable adjustment entitles the contractor to receive certain additional costs of performance plus a reasonable profit on those costs. Equitable adjustments are based on contract clauses granting that remedy, including:
    - a. FAR 52.243-1 thru -7, Changes.
    - b. FAR 52.245-2, -4, -5, and -7, Government Furnished Property.
    - c. FAR 52.248-1 thru -3, Value Engineering.
    - d. FAR 52.242-15, Stop Work Order.
    - e. FAR 52.236-2, Differing Site Conditions.

2. Adjustments. An adjustment entitles the contractor to recover certain additional performance costs, but not profit. The rationale for lack of profit is that there is no change in work and/or risk—only the period in which performance occurs. There are two types of adjustments:
  - a. Work stoppage adjustments. These adjustments allow the contractor to recover certain direct and indirect performance costs. Contract clauses providing for such adjustments are:
    - (1) FAR 52.242-14, Suspension of Work. See Thomas J. Papathomas, ASBCA No. 51352, 99-1 BCA ¶ 30,349; Tom Shaw, Inc., ASBCA No. 28596, 95-1 BCA ¶ 27457.
    - (2) FAR 52.242-17, Government Delay of Work.
  - b. Labor standards adjustments. Adjustments under labor standards clauses include only the increased costs of direct labor (and do not include profit). See FAR 52.222-43; FAR 52.222-44 (Fair Labor Standards Act and Service Contract Act); All Star/SAB Pacific, J.V., ASBCA No. 50856, 98-2 BCA ¶ 29,958; U.S. Contracting, Inc., ASBCA No. 49713, 97-2 BCA ¶ 29,232. But see BellSouth Communications Sys., Inc., ASBCA No. 45955, 94-3 BCA ¶ 27,231 (holding that a price adjustment under the Davis-Bacon Act (FAR 52.222-6) did not preclude profit).
3. Damages. The contractor can recover common law breach of contract damages in certain very narrow situations.
  - a. A contractor may not assert a claim for breach of contract damages when there is a remedy-granting contract clause. Info. Sys. & Network Corp., ASBCA No. 42659, 00-1 BCA ¶ 30,995 (holding that claim for breach damages barred by convenience termination clause); Hill Constr. Corp., ASBCA No. 49820, 99-1 BCA ¶ 30,327 (denying a breach claim for lost profits where the underlying changes were within the ambit of the Changes clause).

- b. Situations where breach damages may be recovered include:
- (1) Breach of a requirements contract. Bryan D. Highfill, HUDBCA No. 96-C-118-C7, 99-1 BCA ¶ 30,316.
  - (2) Bad faith termination for convenience. Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982).
  - (3) Government's failure to disclose material information. Shawn K. Christensen, dba Island Wide Contracting, AGBCA No. 95-188-R, 95-2 BCA ¶ 27,724.
- c. Damages are measured under common law principles (see Section V.E., infra), although cost principles may apply. AT&T Technologies, Inc. v. United States, 18 Cl. Ct. 315 (1989); Shawn K. Christensen, AGBCA No. 95-188R, 95-2 BCA ¶ 27,724.

B. Pricing Formula.

1. General Rule.

- a. The basic adjustment formula is the difference between the reasonable cost to perform the work as originally required, and the reasonable cost to perform the work as changed. See B.R. Servs., Inc., ASBCA Nos. 47673, 48249, 99-2 BCA ¶ 30,397 (holding that the contractor must quantify the cost difference—not merely set forth the costs associated with the changed work); Buck Indus., Inc., ASBCA No. 45321, 94-3 BCA ¶ 27,061.

- b. Pricing adjustments should not alter the basic profit or loss position of the contractor before the change occurred. "An equitable adjustment may not properly be used as an occasion for reducing or increasing the contractor's profit or loss ..., for reasons unrelated to a change." Pacific Architects and Eng'rs, Inc. v. United States, 203 Ct. Cl. 499, 508 491 F.2d 734, 739 (1974). See also Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 97-2 BCA ¶ 29,252 modified by 98-1 BCA ¶ 29,653 (holding that a contractor is entitled to profit on additional work ordered by the Army even though the original work was bid at a loss); Westphal Gmph & Co., ASBCA No. 39401, 96-1 BCA ¶ 28194.
- 2. Pricing Additional Work. Agencies price additional work based on the reasonable costs actually incurred in performing the new work. Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990); The contractor should segregate and accumulate these costs.
- 3. Pricing Deleted Work.
  - a. Agencies price deleted work based on the difference between the estimated costs of the original work and the actual costs of performing the work after the change. Knights' Piping, Inc., ASBCA No. 46985, 94-3 BCA ¶ 27,026; Anderson/Donald, Inc., ASBCA No. 31213, 86-3 BCA ¶ 19,036. But see Condor Reliability Servs., Inc., ASBCA No. 40538, 90-3 BCA ¶ 23,254.
  - b. When the government partially terminates a contract for convenience, a contractor is generally entitled to an equitable adjustment on the continuing work for the increased costs borne by that work as a result of a termination. Deval Corp., ASBCA Nos. 47132, 47133, 99-1 BCA ¶ 30,182; Cal-Tron Sys., Inc., ASBCA Nos. 49279, 50371 97-2 BCA ¶ 28,986; Wheeler Bros., Inc., ASBCA No. 20465, 79-1 BCA ¶ 13,642.
- 4. Responsibility. Where the parties share the fault, they share liability for the added costs. See Essex Electro Engineers, Inc., v. Danzig, 224 F.3d 1283 (Fed. Cir. 2000); Dickman Builders, Inc., ASBCA No. 32612, 91-2 BCA ¶ 23,989.

C. Recoverable Costs. FAR 31.201-2(a) permits contractors to claim only certain costs for adjustment purposes. The contractor must show that the cost is:

1. Reasonable. A cost is reasonable if, in its nature and amount, it does not exceed that which a prudent person would incur in the conduct of a competitive business. FAR 31.201-3.
  - a. Cost held unreasonable in amount. TRC Mariah Associates, Inc., ASBCA No. 51811, 99-1 BCA ¶ 30,386; Kelly Martinez d/b/a Kelly Martinez Constr. Servs., IBCA Nos. 3140, 3144-3174, 97-2 BCA ¶ 29,243. But see Raytheon STX Corp., GSBCA No. 14296-COM, 00-1 BCA ¶ 30,632 (holding that salaries paid key employees during a shutdown were reasonable in amount).
  - b. Nature of cost held unreasonable. Lockheed-Georgia Co., Div. of Lockheed Corp., ASBCA No. 27660, 90-3 BCA ¶ 22,957 (air travel to the Greenbrier resort for executive physicals unreasonable because competent physicians were available in Atlanta).
2. Allocable. A cost is allocable if incurred specifically for the contract; or the cost benefits both the contract and other work, and is distributed to them in reasonable proportion to the benefits received; or is necessary for the overall operation of the business. FAR 31.201-4. See Caldera v. Northrop Worldwide Aircraft Servs., Inc., 192 F.3d 962 (Fed. Cir. 1999) (holding that attorneys fees incurred unsuccessfully defending wrongful termination actions resulted in no benefit to the contract and were not allocable); Boeing North American, Inc., ASBCA No. 49994, 00-2 BCA ¶ 30,970; Information Systems & Network Corp., ASBCA No. 42659, 00-1 BCA ¶ 30,665; P.J. Dick, Inc., GSBCA No. 12415, 96-2 BCA ¶ 28,307 (finding that accounting fees were costs benefiting the contract). But see Clark Concrete Contractors, Inc. v. General Servs. Admin., GSBCA No. 14340, 99-1 BCA ¶ 30,280 (holding that costs incurred on an unrelated project were recoverable because they were "equitable and attributable" by-products of agency design changes).
3. Allowable. FAR 31.204 sets forth the cost principles applicable to government contracts. The government does not pay certain costs, even if they are actually incurred, reasonable, allocable, and properly accounted for. Similarly, the parties may specify in the contract that certain costs will not be allowable.



4. Measured in accordance with accounting standards. Contractors can determine costs by using any generally accepted cost accounting method that is equitably and consistently applied. FAR 31.201-1.
- D. Certification Requirements. The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103-355, § 2301, 108 Stat. 3243 (1994) amended 10 U.S.C. § 2410, Requests for Equitable Adjustment or Other Relief: Certification.
1. In DOD, a request for equitable adjustment that exceeds the simplified acquisition threshold (currently, \$100,000) may not be paid unless a person authorized to certify the request on behalf of the contractor certifies that:
    - a. The request is made in good faith, and
    - b. The supporting data is accurate and complete to the best of that person's knowledge. 10 U.S.C. § 2410(a).
  2. Similarly, after negotiating an agreement on a modification settling a request for equitable adjustment on a negotiated contract, the contractor must furnish a certificate of current cost and pricing data if the modification exceeds \$500,000 under the Truth in Negotiations Act. 10 U.S.C. § 2306(a).

### III. MEASUREMENT OF THE ADJUSTMENT.

- A. Costs. "Costs" for adjustment formula purposes are the sum of allowable direct and indirect costs, incurred or to be incurred, less any allowable credits, plus cost of money. FAR 31.201-1. If it is an equitable adjustment, one must also calculate the profit on the allowable costs.
- B. Direct Costs.
1. A direct cost is any cost that is identified specifically with a particular contract. Direct costs are not limited to items that are incorporated into the end product as material or labor. All costs identified specifically with a claim are direct costs of that claim. FAR 31.202.

2. Direct costs generally include direct labor, direct material, subcontracts, and other direct costs.

C. Indirect Costs.

1. Indirect costs are any costs not directly identified with a single final cost objective, but identified with two or more final cost objectives, or with at least one intermediate cost objective. FAR 31.203. There are two types of indirect costs:
  - a. Overhead. Allocable to a cost objective based on benefit conferred. Typical overhead costs include the costs of personnel administration, depreciation of plant and equipment, utilities, and management.
  - b. General and administrative (G&A). Not allocable based on benefit, but necessary for overall operation of the business. FAR 31.201-4.
2. Calculating indirect cost rates. The total indirect costs divided by the total direct costs equals the indirect cost rate. For example, if a contractor has total indirect costs of \$100,000 in an accounting period, and total direct costs of \$1,000,000 in the same period, the indirect cost rate is 10%.
3. Some agencies limit the recoverable overhead through contract clauses. Reliance Ins. Co. v. United States, 931 F.2d 863 (Fed. Cir. 1991) (court upheld clause which limited recoverable overhead for change orders).

D. Profit and Loss. An equitable adjustment includes a reasonable and customary allowance for profit. United States v. Callahan Walker Constr. Co., 317 U.S. 56 (1942). Adjustments under the Suspension of Work/Government Delay of Work clauses (FAR 52.242-14, 52.242-17) expressly do not include profit. Profit is calculated as:

1. The rate earned on the unchanged work;
2. A lower rate based on the reduced risk of equitable adjustments; or

3. The rate calculated using weighted guidelines. See Doyle Constr. Co., ASBCA No. 44883, 94-2 BCA ¶ 26,832.

#### IV. PROVING THE AMOUNT OF THE ADJUSTMENT.

##### A. Burden of Proof.

1. The burden is on the party claiming the benefit of the adjustment. Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994); Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987) (moving party “bears the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation”); B&W Forest Products, AGBCA Nos. 96-180, 96-198-1, 98-1 BCA ¶ 29,354.
2. What must the party prove?
  - a. Entitlement (Liability)—the government did something that changed the contractor’s costs, for which the government is legally liable. T.L. James & Co., ENG BCA No. 5328, 89-1 BCA ¶ 21,643.
  - b. Causation—there must be a causal nexus between the basis for liability and the claimed increase (or decrease) in cost. Hensel Phelps Constr. Co., ASBCA No. 49270, 99-2 BCA ¶ 30,531; Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 98-1 BCA ¶ 29,653, modifying 97-2 BCA ¶ 29,252; Oak Adec, Inc. v. United States, 24 Cl. Ct. 502 (1991).
  - c. Resultant Injury—that there is an actual injury or increased cost to the moving party. Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991); Cascade General, Inc., ASBCA No. 47754, 00-2 BCA ¶ 31,093 (holding that a contractor claim was deficient when it failed to substantiate what specific work and/or delays resulted from the defective government specifications).

##### B. Methods of Proof.

1. Actual Cost Method. The actual cost method is the preferred method for proving costs. Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991).
  - a. A contractor must prove its costs using the best evidence available under the circumstances. The preferred method is actual cost data. Cen-Vi-Ro of Texas, Inc. v. United States, 210 Ct. Cl. 684, 538 F.2d 348 (1976); Deval Corp., ASBCA Nos. 47132, 47133, 99-1 BCA ¶ 30,182.
  - b. The contracting officer may include the Change Order Accounting clause, FAR 52.243-6, in a contract. This clause permits the contracting officer to order the accumulation of actual costs. A contractor must indicate in its proposal, which proposed costs are actual and which are estimates.
  - c. Failure to accumulate actual cost data may result in either a substantial reduction or total disallowance of the claimed costs. Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990) (recovery reduced for unexcused failure to segregate); Togaroli Corp., ASBCA No. 32995, 89-2 BCA ¶ 21,864 (costs not segregated despite the auditor's repeated recommendation to do so; no recovery beyond final decision); Assurance Co., ASBCA No. 30116, 86-1 BCA ¶ 18,737 (lack of cost data prevented reasonable approximation of damages for jury verdict, therefore, the appellant recovered less than the amount allowed in the final decision).
2. Estimated Cost Method.
  - a. Good faith estimates are preferred when actual costs are not available. Lorentz Brunn Co., GSBCA No. 8505, 88-2 BCA ¶ 20,719 (estimates of labor hours and rates admissible). Estimates are generally required when negotiating the cost of a change in advance of performing the work. Estimates are an acceptable method of proving costs where they are supported by detailed substantiating data or are reasonably based on verifiable cost experience. J.M.T. Mach. Co., ASBCA No. 23928, 85-1 BCA ¶ 17,820 (1984), aff'd on other grounds, 826 F.2d 1042 (Fed. Cir. 1987).

- b. If the contractor uses detailed estimates based on analyses of qualified personnel, the government will not be able to allege successfully that the contractor used the disfavored total cost method of adjustment pricing. Illinois Constructors Corp., ENG BCA No. 5827, 94-1 BCA ¶ 26,470.
- c. Estimates based on Mean's Guide must be disregarded where actual costs are known. Anderson/Donald, Inc., ASBCA No. 31213, 86-3 BCA ¶ 19,036.

3. Total Cost Method.

- a. The total cost method is not preferred because it assumes the entire overrun is solely the government's fault. The total cost method calculates the difference between the bid price on the original contract and the actual total cost of performing the contract as changed. Servidone v. United States, 931 F.2d 860 (Fed. Cir. 1991); Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991); Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 98-1 BCA ¶ 29,653, modifying 97-2 BCA ¶ 29,252; Santa Fe Eng'rs, Inc., ASBCA No. 36682, 96-2 BCA ¶ 28,281; Concrete Placing Inc. v. United States, 25 Cl. Ct. 369 (1992).
- b. To use the total cost method, the contractor must establish four factors:
  - (1) The nature of the particular cost is impossible or highly impracticable to determine with a reasonable degree of certainty;
  - (2) The contractor's bid was realistic;
  - (3) The contractor's actual incurred costs were reasonable; and
  - (4) The contractor was not responsible for any of the added costs. WRB Corp. v. United States, 183 Ct. Cl. 409 (1968).

4. Modified total cost method. The court or board of contract appeals allows the contractor to adjust the total cost method to account for other factors, usually because the bid was not realistic or because there were other causes for the extra costs. Olsen v. Espy, 26 F.3d 141 (Fed. Cir. 1994); River/Road Constr. Inc., ENG BCA No. 6256, 98-1 BCA ¶ 29,334; Hardrives, Inc., IBCA No. 2319, 94-1 BCA ¶ 26,267; Servidone Constr. Corp., ENG BCA No. 4736, 88-1 BCA ¶ 20,390; Teledyne McCormick-Selph v. United States, 218 Ct. Cl. 513 (1978).

C. Jury Verdicts.

1. Jury verdicts are not a method of proof, but a means of resolving disputed facts. Northrop Grumman Corp. v. United States, 47 Fed. Cl. 20 (2000); Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990); River/Road Constr. Inc., ENG BCA No. 6256, 98-1 BCA ¶ 29,334; Cyrus Contracting Inc., IBCA Nos. 3232, 3233, 3895-98, 3897-98, 98-2 BCA ¶ 29,755; Paragon Energy Corp., ENG BCA No. 5302, 88-3 BCA ¶ 20,959. Before adopting a jury verdict approach, a court must first determine three things:
  - a. That clear proof of injury exists;
  - b. That there is no more reliable method for computing damages. See Dawco Constr. Co. v. United States, 930 F.2d 872 (Fed. Cir. 1991) (actual costs are preferred; where contractor offers no evidence of justifiable inability to provide actual costs, then it is not entitled to a jury verdict); Service Eng'g Co., ASBCA No. 40274, 93-2 BCA ¶ 25,885; and
  - c. That the evidence is sufficient for a fair and reasonable approximation of the damages. Northrop Grumman Corp. v. United States, 47 Fed. Cl. 20 (2000);

## V. SPECIAL ITEMS.

### A. Unabsorbed Overhead.

1. Generally. A type of cost associated with certain types of claims is "unabsorbed overhead." Unabsorbed overhead has been allowed to compensate a contractor for work stoppages, idle facilities, inability to use available manpower, etc., due to government fault. In such delay situations, fixed overhead costs, e.g., depreciation, plant maintenance, cost of heat, light, etc., continue to be incurred at the usual rate, but there is less than the usual direct cost base over which to allocate them. Therm-Air Mfg. Co., ASBCA No. 15842, 74-2 BCA ¶ 10,818.
2. Contracts Types. Most unabsorbed overhead cases deal with recovery of additional overhead costs on construction and manufacturing contracts. The qualitative formula adopted in Eichleay Corp., ASBCA 5183, 60-2 BCA ¶ 2688, aff'd on recons., 61-1 BCA ¶ 2894, is the exclusive method of calculating unabsorbed overhead for both construction contracts (Wickham Contracting Co. v. Fischer, 12 F.3d 1574 (Fed. Cir. 1994)) and manufacturing contracts (West v. All State Boiler, Inc., 146, F.3d 1368 (Fed. Cir. 1998); Genisco Tech. Corp., ASBCA No. 49664, 99-1 BCA ¶ 30,145, mot. for recons. den., 99-1 BCA ¶ 30,324; Libby Corp., ASBCA No. 40765, 96-1 BCA ¶ 28,255).
  - a. Under this method, calculate the daily overhead rate during the contract period, then multiply the daily rate by the number of days of delay.
  - b. To be entitled to unabsorbed overhead recovery under the Eichleay formula, the following three elements must be established:
    - (1) a government-caused or government-imposed delay,
    - (2) the contractor was required to be on "standby" during the delay, and
    - (3) while "standing by," the contractor was unable to take on additional work.

Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999); West v. All State Boiler, 146 F.3d 1368 (Fed. Cir. 1998); Satellite Elec. Co. v. Dalton, 105 F.3d 1418 (Fed. Cir. 1997); Altmayer v. Johnson, 79 F.3d 1129 (Fed. Cir. 1995).

- c. If work on the contract continues uninterrupted, albeit in a different order than originally planned, the contractor is not on standby. Further, a definitive delay precludes recovery "because 'standby' requires an uncertain delay period where the government can require the contractor to resume full-scale work at any time." Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999); American Renovation & Constr. Co., Inc. v. United States, 45 Fed. Cl. 44 (1999).
- d. A contractor's ability to take on additional work focuses upon the contractor's ability to take on replacement work during the indefinite standby period. Replacement work must be similar in size and length to the delayed government project and must occur during the same period. Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999); West v. All-State Boiler, 146 F.3d 1368, 1377 n.2 (Fed. Cir. 1998).

3. Proof Requirements.

- a. Recovery of unabsorbed overhead is not automatic. The contractor should offer credible proof of increased costs resulting from the government-imposed delay. Beaty Elec. Co., EBCA No. 403-3-88, 91-2 BCA ¶ 23,687; but see Sippial Elec. & Constr. Co. v. Widnall, 69 F.3d (Fed. Cir. 1995) (allowing Eichleay recovery with proof of actual damages).



- b. A contractor must prove only the first two elements of the Eichleay formula. Once the contractor has established the Government caused delay and the fact that it had to remain on "standby," it has made a prima facie case that it is entitled to Eichleay damages. The burden of proof then shifts to the government to show that the contractor did not suffer or should not have suffered any loss because it was able to either reduce its overhead or take on other work during the delay. Satellite Elec. Co. v. Dalton, 105 F.3d 1418 (Fed. Cir. 1997); Mech-Con Corp. v. West, 61 F.3d 883 (Fed Cir. 1995).
  - c. When added work causes a delay in project completion, the additional overhead is absorbed by the additional costs and Eichleay does not apply. Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575 (Fed. Cir. 1993) (Eichleay recovery denied because overhead was "extended" as opposed to "unabsorbed"); accord C.B.C. Enters., Inc. v. United States, 978 F.2d 669 (Fed. Cir. 1992).
- 4. Subcontractor Unabsorbed Overhead. Timely completion by a prime contractor does not preclude a subcontractor's pass-through claim for unabsorbed overhead. E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).
  - 5. Multiple Recovery. A contractor may not recover unabsorbed overhead costs under the Eichleay formula where it has already been compensated for the impact of the government's constructive change on performance time and an award under Eichleay would lead to double recovery of overhead. Keno & Sons Constr. Co., ENG BCA No. 5837-Q, 98-1 BCA ¶ 29,336.
  - 6. Profit. A contractor is not entitled to profit on an unabsorbed overhead claim. ECC Int'l Corp., ASBCA Nos. 45041, 44769, 39044, 94-2 BCA ¶ 26,639; Tom Shaw, Inc., ASBCA No. 28596, 95-1 BCA ¶ 27,457; FAR 52.212-12, 52.212-15.

B. Subcontractor Claims.

1. The government consents generally to be sued only by parties with which it has privity of contract. Erickson Air Crane Co. of Wash. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).
2. A prime contractor may sue the government on a subcontractor's behalf, in the nature of a pass-through suit, for the extra costs incurred by the subcontractor only if the prime contractor is liable to the subcontractor for such costs. When a prime contractor is permitted to sue on behalf of a subcontractor, the subcontractor's claim merges into that of the prime, because the prime contractor is liable to the subcontractor for the harm caused by the government. Absent proof of prime contractor liability, the government retains its sovereign immunity from pass-through suits. Severin v. United States, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944)); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).
3. The government may use the Severin doctrine as a defense, however, only when it raises and proves the issue at trial. If the government fails to raise its immunity defense at trial, then the subcontractor claim is treated as if it were the prime's claim and any further concern about the absence of subcontractor privity with the government is extinguished. Severin v. United States, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944)); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).

C. Loss of Efficiency. The disruption caused by government changes and/or delays may cause a loss of efficiency to the contractor.

1. Burden of Proof. A contractor may recover for loss of efficiency if it can establish both that a loss of efficiency has resulted in increased costs and that the loss was caused by factors for which the Government was responsible. Luria Bros. & Co. v. United States, 177 Ct. Cl. 676, 369 F.2d 701 (1966). See generally Thomas E. Shea, Proving Productivity Losses in Government Contracts, 18 Pub. Cont. L. J. 414 (March 1989).

2. Applicable Situations. Loss of efficiency has been recognized as resulting from various conditions causing lower than normal or expected productivity. Situations include: disruption of the contractor's work sequence (Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516 1993)); working under less favorable weather conditions (Charles G. Williams Constr., Inc., ASBCA No. 42592, 92-1 BCA ¶ 24,635); the necessity of hiring untrained or less qualified workers (Algernon-Blair, Inc., GSBCA No. 4072, 76-2 BCA ¶ 12,073); and reductions in quantity produced.

D. Impact on Other Work.

1. General Rule. A contractor is generally prohibited from recovering costs under the contract in which a Government change, suspension, or breach occurred, when the impact costs are incurred on other contracts. Courts and boards usually consider such damages too remote or speculative, and subject to the rule that consequential damages are not recoverable under Government contracts. See General Dynamics Corp. v. United States, 218 Ct. Cl. 40, 585 F.2d 457 (1978); Defense Systems Company, ASBCA No. 50918, 00-2 BCA ¶ 30,991 (holding the loss of sales on other contracts was too remote and speculative to be recoverable); Sermor, Inc., ASBCA No. 30576, 94-1 BCA ¶ 26,302; Ferguson Management Co., AGBCA No. 83-207-3, 83-2 BCA ¶ 16,819.
2. Exceptions. In only exceptional circumstances, especially when the impact costs are definitive in both causation and amount, contractors have recovered for additional expenses incurred in unrelated contracts. See Clark Concrete Contractors, Inc. v. General Servs. Admin., GSBCA No. 14340, 99-1 BCA ¶ 30,280 (allowing recovery of additional costs incurred on an unrelated project as a result of government delays and changes).

E. Breach Damages.

1. Consequential Damages. The general rule is that consequential damages are not recoverable unless they are foreseeable and caused directly by the government's breach. Prudential Ins. Co. of Am. v. United States, 801 F.2d 1295 (Fed. Cir. 1986); Land Movers Inc. and O.S. Johnson - Dirt Contractor (JV), ENG BCA No. 5656, 91-1 BCA ¶ 23,317 (no recovery of lost profits based on loss of bonding capacity; also no recovery related to bankruptcy, emotional distress, loss of business, etc.).

2. Compensatory Damages. A contractor whose contract was breached by the government is entitled to be placed in as good a position as it would have been if it had completed performance. PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647 (the measure of damages for failure to order the minimum quantity is not the contract price; the contractor must prove actual damages). Compensatory damages include a reliance component (costs incurred as a consequence of the breach), and an expectancy component (lost profits). Keith L. Williams, ASBCA No. 46068, 94-3 BCA ¶ 27,196.

F. Attorneys' Fees.

1. Costs related to prosecuting and defending claims and appeals against the federal government are unallowable. FAR 31.205-47; Singer Co. v. United States, 215 Ct. Cl. 281, 568 F.2d 695 (1977); Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 97-2 BCA ¶ 29,252 modified by 98-1 BCA ¶ 29,653; Marine Hydraulics Int'l, Inc., ASBCA No. 46116, 94-3 BCA ¶ 27,057; P&M Indus., Inc., ASBCA No. 38759, 93-1 BCA ¶ 25,471. This is consistent with the general rule that attorneys' fees are not allowed in suits against the United States absent an express statutory provision allowing recovery. Piggly Wiggly Corp. v. United States, 112 Ct. Cl. 391, 81 F. Supp. 819 (1949).
  - a. The Equal Access to Justice Act, 5 U.S.C. § 504, authorizes courts and boards to award attorneys fees to qualifying prevailing parties unless the government can show that its position was "substantially justified." See, e.g., Midwest Holding Corp., ASBCA No. 45222, 94-3 BCA ¶ 27,138.
2. Costs incurred incident to contract administration, or in furtherance of the negotiation of the parties' disputes, are allowable. Bill Strong Enters. v. Shannon, 49 F.3d 1541 (Fed. Cir. 1995)(holding that when the genuine purpose of incurred legal expenses is that of materially furthering a negotiation process, such cost should normally be allowable); FAR 31.205-33 (consultant and professional costs may be allowable if incurred to prepare a demand for payment that does not meet the CDA definition of a "claim").

3. Legal fees unrelated to presenting or defending claims against the government are generally allowable. Info. Sys. & Networks Corp., ASBCA No. 42659, 00-1 BCA ¶ 30,665 (holding that legal expenses incurred in lawsuits against third-party vendors were allowable as part of convenience termination settlement); Bos'n Towing and Salvage Co., ASBCA No. 41357, 92-2 BCA ¶ 24,864 (holding that costs of professional services, including legal fees, are generally allowable, except where specifically disallowed). But see Caldera v. Northrop Worldwide Aircraft Servs., Inc., 192 F.3d 962 (Fed. Cir. 1999) (holding that legal expenses incurred unsuccessfully defending wrongful termination actions by employees who would not partake in contractor fraud were not recoverable).

G. Interest.

1. Pre-Claim Interest.

- a. Generally. Contractors are not entitled to interest on borrowings, however represented, as part of an equitable adjustment. FAR 31.205-20; Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991); D.E.W. & D.E. Wurzbach, A Joint Venture, ASBCA No. 50796, 98-1 BCA ¶ 29,385; Superstaff, Inc., ASBCA Nos. 48062, et al., 97-1 BCA ¶ 28,845; Tomahawk Constr. Co., ASBCA No. 45071, 94-1 BCA ¶ 26,312. This is consistent with the general rule that the United States is immune from interest liability absent an express statutory provision allowing recovery. Library of Congress v. Shaw, 478 U.S. 310 (1986).
- b. Lost Opportunity Costs. The damages for the "opportunity cost of money" are unrecoverable as a matter of law. Adventure Group, Inc., ASBCA No. 50188, 97-2 BCA ¶ 29,081; Environmental Tectonics Corp., ASBCA No. 42,540, 92-2 BCA ¶ 24,902 (not only interest on actual borrowings, but also the economic equivalent thereof, are unallowable); Dravo Corp. v. United States, 219 Ct. Cl. 416, 594 F.2d 842 (1979).

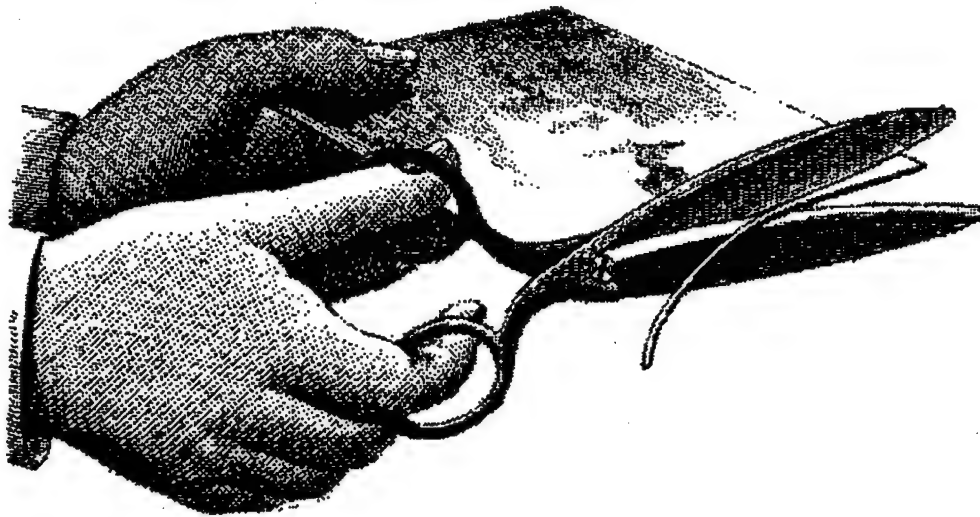
- c. Cost of Money. Contractors may recover facilities capital cost of money (FCCM) (the cost of capital committed to facilities) as part of an equitable adjustment. FAR 31.205-10. Among the various allowability criteria, a contractor must specifically identify FCCM in its bid or proposal relating to the contract under which the FCCM cost is then claimed. FAR 31.205-10(a)(2). See also McDonnell Douglas Helicopter Co. d/b/a McDonnell Douglas Helicopter Sys., ASBCA No. 50756, 98-1 BCA ¶ 29,546.
- 2. Prompt Payment Act Interest. Under the Prompt Payment Act (31 U.S.C. §§ 3901-3907), the contractor is entitled to interest if the contractor submits a proper voucher and the government fails to make payment within 30 days.
- 3. Contract Disputes Act Interest.
  - a. Generally. A contractor is entitled to interest on its claim based upon the rate established by the Secretary of the Treasury, as provided by the Contract Disputes Act, 41 U.S.C. § 611.
  - b. Timing. Interest begins to run when the contracting officer receives a properly certified claim. Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991), or upon submission of a defectively certified claim that is subsequently certified. Federal Courts Administration Act of 1992, Title IX, Pub. L. No. 102-572, 106 Stat. 4506, 4518. Interest runs regardless of whether the claimed costs have actually been incurred at the date of submission of a claim. Servidone Constr. Co. v. United States, 931 F.2d 860 (Fed. Cir. 1991).

- c. Convenience Termination Settlements. A termination for convenience settlement proposal (FAR 49.206) is not initially considered a CDA claim, as it is generally submitted for purposes of negotiation. James M. Ellett Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996). Accordingly, a contractor is not entitled to interest on the amount due under a settlement agreement or determination. FAR 49.112-2(d); Ellett Constr., supra. If a termination settlement proposal matures into a CDA claim (once settlement negotiations reach an impasse), then a contractor is entitled to interest. Rex Sys., Inc., ASBCA No. 52247, 00-1 BCA ¶ 30,671.
- 4. Payment of Interest. When the contracting officer pays a claim, the payment is applied first to accrued interest. Then the payment is applied to the principal amount due. Any unpaid principal continues to accrue interest. Paragon Energy Corp., ENG BCA No. 5302, 91-3 BCA ¶ 24,349.

## VI. CONCLUSION.

- A. The various circumstances that entitle a contractor to a contract price adjustment (equitable adjustments, adjustments, damages) result in different types/amounts of recovery.
- B. The basic measurement of a price adjustment is the difference between the reasonable costs of the original and changed work.
- C. The burden of proving a price adjustment is on the moving party, and the method of proving a price adjustment is to use the best evidence available.
- D. The various special items that often comprise a price adjustment demand special attention.

*Chapter 22*  
**Contract Terminations  
for Convenience**



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## **CHAPTER 22**

### **CONTRACT TERMINATIONS FOR CONVENIENCE**

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## CHAPTER 22

### CONTRACT TERMINATIONS FOR CONVENIENCE

#### I. INTRODUCTION.

##### A. References.

1. FAR Part 49.
2. FAR 52.249-1 through 52.249-7.

##### B. Historical Development. See Krygoski Constr. Co., Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996) (court traces history of government's right to terminate contracts for convenience).

##### 1. Inherent Authority.

- a. The government has inherent authority to suspend contracts. United States v. Corliss Steam Engine Co., 91 U.S. 321 (1875).
- b. A contractor can recover breach of contract damages, which include anticipatory (lost) profits, as a result of a termination based on inherent authority. United States v. Speed, 75 U.S. 77 (1868).

##### 2. Statutory and Regulatory Authority.

- a. Terminations for the government's convenience developed as a tool to avoid enormous procurements upon completion of a war effort. See Dent Act, 40 Stat. 1272 (1919); Contract Settlement Act of 1944, 58 Stat. 649.

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- b. Settlement of war related contracts led to the federal procurement policy that the parties to a federal contract must bilaterally agree that the government can terminate a contract for convenience.
- c. Convenience termination clauses preclude the contractor from recovering anticipatory or lost profits when the government in good faith terminates the contract for its convenience.

## II. THE RIGHT TO TERMINATE FOR CONVENIENCE.

- A. Termination is for the convenience of the government. When a contractor is performing at a loss, termination may be beneficial to the contractor, but the government has no duty to the contractor to exercise the government's right to terminate for the contractor's benefit. Contact Int'l Corp., ASBCA No. 44636, 95-2 BCA ¶ 27,887; Rotair Indus., ASBCA No. 27571, 84-2 BCA ¶ 17,417.
- B. Termination for Convenience Clauses. FAR 52.249-1 through 52.249-7.
  - 1. The FAR provides various termination for convenience clauses. The proper clause for a specific contract is dependent upon the type and dollar amount of the contract. See FAR Subpart 49.5.
    - a. Contracts for commercial items and simplified acquisitions for other than commercial items include unique convenience termination provisions that, for the most part, are not covered by Subpart 49.5. See 52.212-4 and 52.213-4.
    - b. "Short form" clauses govern fixed-price contracts not to exceed \$100,000. Settlement is governed by FAR Part 49. See Arrow, Inc., ASBCA No. 41330, 94-1 BCA ¶ 26,353 (board denied claim for useful value of special machinery and equipment because service contract properly contained short form termination clause).
    - c. Fixed-price contract "long form" clauses (contracts exceeding \$100,000). These clauses specify contractor obligations and termination settlement provisions.

- d. Cost reimbursement contract clauses. These clauses cover both convenience and default terminations, and specify detailed termination settlement provisions. See 52.249-6.
- 2. The clauses give the government a right to terminate a contract, in whole or in part, when in the government's interest.
- 3. The clauses also provide the contractor with a monetary remedy.
  - a. The contractor is entitled to:
    - (1) the contract price for completed supplies or services accepted by the government;
    - (2) reasonable costs incurred in the performance of the work terminated, to include a fair and reasonable profit (unless the contractor would have sustained a loss on the contract if the entire contract had been completed); and
    - (3) reasonable costs of settlement of the work terminated. See FAR 52.249-2(g).
  - b. The cost principles of FAR Part 31 in effect on the date of the contract shall govern the claimed costs.
  - c. Exclusive of settlement costs, the contractor's recovery may not exceed the total contract price.
  - d. The contractor cannot recover anticipated (lost) profits or consequential damages, which would be recoverable under common law breach of contract principles. FAR 49.202(a).

- C. The "Christian Doctrine." A mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law. G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl. 1963) (termination for convenience clause read into the contract by operation of law).
1. The Christian doctrine does not turn on whether clause was intentionally or inadvertently omitted, but on whether procurement policies are being avoided or evaded, deliberately or negligently, by lesser officials. S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072 (Fed. Cir. 1993) (Buy American Act (BAA) clause for construction contract read into contract after it had been stricken and erroneously replaced by the BAA supply clause).
  2. The Christian doctrine applies only to mandatory clauses reflecting significant public procurement policies. Michael Grinberg, DOT BCA No. 1543, 87-1 BCA ¶ 19,573 (board refused to incorporate by operation of law a discretionary T4C clause).
  3. The Christian doctrine does not apply when the contract includes an authorized deviation from the standard termination for convenience clause. Montana Refining Co., ASBCA No. 44250, 94-2 BCA ¶ 26,656 (ID/IQ contract with a stated minimum quantity included deviation in T4C clause that agency would not be liable for unordered quantities of fuel "unless otherwise stated in the contract").
  4. When a contract lacks a termination clause, an agency can't limit termination settlement costs by arguing that the Short Form termination clause applies. Empres de Viacao Terceirenses, ASBCA No. 49827, 00-1 BCA ¶ 30,796 (ASBCA noted that use of the Short Form clause was predicated on a contracting officer's determination and exercise of discretion, which was lacking in this case).
- D. Application of Convenience Termination Remedies.
1. Termination by Conversion.

- a. The termination for default clauses provide that an erroneous default termination converts to a termination for convenience. FAR 52.249-8(g); FAR 52.249-10(c).
  - b. However, if the government acted in bad faith while terminating a contract for default, courts and boards will award common law breach damages rather than the usual termination for convenience costs. See Apex Int'l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842 (finding 20 breaches, ASBCA holds Navy liable for breach damages).
2. Constructive Termination for Convenience.
- a. A government directive to end performance of work will not be considered a breach but rather a convenience termination if the action could lawfully fall under that clause, even if the government mistakenly thinks a contract invalid, erroneously thinks the contract can be terminated on other grounds, or wrongly calls a directive to stop work a "cancellation." G.C. Casebolt Co. v. United States, 421 F.2d 710 (Ct. Cl. 1970); John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963).
  - b. The constructive termination for convenience doctrine is based on the concept that a contracting party who is sued for breach may ordinarily defend on the ground that there existed at the time of the breach a legal excuse for nonperformance, although that party was then ignorant of the fact. College Point Boat Corp. v. United States, 267 U.S. 12 (1925).
  - c. However, the government cannot use the constructive termination for convenience theory to retroactively terminate a fully performed contract in an effort to limit its liability for failing to order the contract's minimum amount of goods or services. Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988); PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647.

- d. Further, the government may not require bidders to agree in advance that the government's failure to order the contract's minimum quantity will be treated as a termination for convenience. Southwest Lab. of Okla., Inc., B-251778, May 5, 1993, 93-1 CPD ¶ 368.
3. Deductive Change Versus Partial Termination for Convenience.
- a. The contracting officer must determine whether deleted work is a deductive change or a termination for convenience.
  - b. This distinction is important because it determines whether the measure of the contractor's recovery is under the contract's changes clause or the termination for convenience clause.
  - c. Generally, the courts and boards will not overturn the contracting officer's determination that the deleted work is a deductive change if the parties consistently treated the deletion as such. Dollar Roofing, ASBCA No. 36461, 92-1 BCA ¶ 24,695. But see Griffin Servs., Inc., GSBCA No. 11022, 92-3 BCA ¶ 25,181 (board characterized deleted work as a partial termination for convenience, but ordered recovery based on the changes clause).
  - d. If the contractor disputes the contracting officer's treatment of the deletion, courts and boards will examine the relative significance of the deleted work.
    - (1) If major portions of the work are deleted and no additional work is substituted in its place, the termination for convenience clause must be used. Nager Elec. Co. v. United States, 442 F.2d 936 (Ct. Cl. 1971).
    - (2) Courts and boards will treat the deletion of relatively minor and segregable items of work as a deductive change. Lionsgate Corp., ENG BCA No. 5425, 90-2 BCA ¶ 22,730.

### III. THE DECISION TO TERMINATE FOR CONVENIENCE.

#### A. Regulatory Guidance.

1. The FAR clauses give the government the right to terminate a contract in whole or in part if the contracting officer determines that termination is in the government's interest. See John Massman Contracting Co. v. United States, 23 Cl. Ct. 24 (1991) (no duty to terminate when it would be in the contractor's best interest).
2. The FAR provides no guidance on factors that the contracting officer should consider when determining whether termination is "in the government's interest." FAR 49.101(b) and the convenience termination clauses merely provide that contracting officers shall terminate contracts only when it is in the government's interest to do so.
3. The right to terminate "comprehends termination in a host of variable and unspecified situations" and is not limited to situations where there is a "decrease in the need for the item purchased." John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964).
4. A "cardinal change" in the government's requirements is not a prerequisite to a termination for convenience. T&M Distributors, Inc. v. United States, 185 F.3d 1279 (Fed. Cir. 1999).
5. The FAR does provide guidance concerning circumstances in which contracting officers normally **cannot or should not** use a convenience termination. For example, a negotiated no-cost settlement is appropriate instead of a termination for convenience or default when
  - a. The contractor will accept it;
  - b. Government property was not furnished; and,



- c. There are no outstanding payments due to the contractor, debts due by the contractor to the government, or other contractor obligations. FAR 49.101(b).
- 6. The government normally should not terminate a contract, but should allow it to run to completion, when the price of the undelivered balance of the contract is less than \$5,000. FAR 49.101(c).
- 7. In many cases, the contracting officer must obtain authorization before exercising his or her authority to terminate a contract for convenience. However, there is no requirement to give the contractor a hearing before the termination decision. Melvin R. Kessler, PSBCA No. 2820, 92-2 BCA ¶ 24,857.
- 8. Notice of termination. When terminating a contract for convenience, the contracting officer must provide notice to the contractor, the contract administration office, and any known assignee, guarantor, or surety of the contractor. Notice shall be made by certified mail or hand delivery. FAR 49.102.
- 9. Contractor duties after receipt of notice of termination. FAR 49.104. The contractor is required generally to:
  - a. Stop work immediately and stop placing subcontracts;
  - b. Terminate all subcontracts;
  - c. Immediately advise the TCO of any special circumstances precluding work stoppage;
  - d. Perform any continued portion of the contract and submit promptly any request for equitable adjustment to the price;
  - e. Protect and preserve property in the contractor's possession;

- f. Notify TCO in writing concerning any legal proceedings growing out of any subcontract or other commitment related to the terminated portion of the contract;
- g. Settle subcontract proposals;
- h. Promptly submit own termination settlement proposal; and
- i. Dispose of termination inventory as directed or authorized by TCO.

10. Duties of TCO after notice of termination. FAR 49.105.

- a. Direct action of prime contractor;
- b. Examine contractor's settlement proposal and subcontractor proposals;
- c. Promptly negotiate settlement agreement or settle by determination.

B. Standard of Review.

- 1. The courts and boards recognize the government's broad right to terminate a contract for convenience. It is not the province of the courts to decide de novo whether termination of the contract was the best course of action. Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990).

2. The "Kalvar" test. To find that a termination for convenience in legal effect is a breach of contract, a contractor must prove bad faith or clear abuse of discretion. This is sometimes referred to as the "Kalvar" test. Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990); Kalvar Corp., Inc., v. United States, 543 F.2d 1298 (Ct. Cl. 1976); TLT Constr. Corp., ASBCA No. 40501, 93-3 BCA ¶ 25,978 (inept government actions do not constitute bad faith); Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000).<sup>1</sup>

- a. Bad faith.

- (1) Boards and courts presume that contracting officers act conscientiously in the discharge of their duties. Krygoski Construction Company, Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).
- (2) To succeed on this theory, a contractor must show through "well nigh-irrefragable proof," tantamount to evidence of some specific intent to injure the contractor, that the contracting officer acted in bad faith. Kalvar Corp., Inc., v. United States, 543 F.2d 1298 (Ct. Cl. 1976).

- b. Abuse of discretion.

- (1) A contracting officer's decision to terminate for convenience cannot be arbitrary or capricious.
- (2) The Court of Claims (predecessor to the Court of Appeals for the Federal Circuit) cited four factors to apply in determining whether a contracting officer's discretionary decision is arbitrary or capricious. Keco Indus. v. United States, 492 F.2d 1200 (Ct. Cl. 1974). These factors are:

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<sup>1</sup>The court applied the tests for finding a termination improper that were suggested by the Federal Circuit in Krygoski Construction Company, Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996). The court found that the National Aeronautics and Space Administration (NASA) did not terminate Northrop's Space Station contract "simply to acquire a better bargain from another source," nor did NASA enter its contract with Northrop with no intent of fulfilling its promises.

- (a) Evidence of subjective bad faith on the part of the government official;
- (b) Lack of a reasonable basis for the decision;
- (c) The amount of discretion given to the government official; *i.e.*, the greater the discretion granted, the more difficult it is to prove that the decision was arbitrary and capricious; and,
- (d) A proven violation of an applicable statute or regulation [this factor alone may be enough to show that the conduct was arbitrary and capricious].

3. The Torncello "change in circumstances" test.

- a. In 1982, a plurality of the Court of Claims articulated a different test for the sufficiency of a convenience termination.
  - (1) The test is known as the "change in circumstances" test. Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982) (T4C clause could not be used to avoid paying anticipated profits unless there was some change in circumstances between time of award and termination).
  - (2) Critics of the "change in circumstances" test charged that the court should have applied the "Kalvar" test.
- b. The Court of Appeals for the Federal Circuit subsequently characterized Torncello as a "bad faith" case. Salsbury Indus. v. United States, 905 F.2d. 1518 (Fed. Cir. 1990) ("[Torncello] stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause.") This rationale had been applied by the ASBCA prior to the Federal Circuit's decision. See Dr. Richard L. Simmons, ASBCA No. 34049, 87-3 BCA ¶ 19,984; Tamp Corp., ASBCA No. 25692, 84-2 BCA ¶ 17,460.

- c. Moreover, the court has refused to extend Torncello to situations in which the government contracts in good faith while having knowledge of facts putting it on notice that termination may be appropriate in the future. See Krygoski Construction Company, Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996); Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578 (Fed. Cir. 1995).
  - d. Contractors are still arguing the change in circumstances test today, though unsuccessfully. See T&M Distributors, Inc. v. United States, 185 F.3d 1279 (Fed. Cir. 1999).
4. Effect of Improper Termination.
- a. By terminating in bad faith or arbitrarily and capriciously, the government breaches the contract, permitting the contractor to recover breach of contract damages, including anticipatory (lost) profits. See Operational Serv. Corp., ASBCA No. 37059, 93-3 BCA ¶ 26,190 (government breached contract by exercising option year of contract while knowing that it would award a commercial activities contract or perform the work in house).
  - b. The general rule is to place the injured party in as good a position as the one he would have been in had the breaching party fully performed. Remote and consequential damages are not recoverable. Travel Centre v. General Services Administration, GSBCA No. 14057, 99-2 BCA ¶ 30,521 (board denies contractor claims of lost future net income and value of business closed as result of contract termination). But see Energy Capital Corp. v. United States, 47 Fed. Cl. 382 (2000) (awarding \$8.78 million in lost profits to new venture).

C. Revocation of a Termination for Convenience.

- 1. Reinstatement of the contract. FAR 49.102(d).

- a. A terminated portion of a contract may be reinstated in whole or in part if the contracting officer determines in writing that there is a requirement for the terminated items and that the reinstatement is advantageous to the government. To the Administrator, Gen. Servs. Admin., 34 Comp. Gen. 343 (1955).
  - b. The written consent of the contractor is required. The contracting officer may not reinstate a contract unilaterally.
2. A termination for default cannot be substituted for a termination for convenience. Roged, Inc., ASBCA No. 20702, 76-2 BCA ¶ 12,018; But see Amwest Surety Ins. Co., ENG BCA No. 6036, 94-2 BCA ¶ 26,648 (substitution allowed where government issued "conditional" termination for convenience).

#### IV. CONVENIENCE TERMINATION SETTLEMENTS.

- A. Procedures. FAR Part 49.
  1. After termination for convenience, the parties must:
    - a. Stop the work.
    - b. Dispose of termination inventory.
    - c. Adjust the contract price.
  2. Timing of the termination settlement proposal.

- a. The contractor must submit its termination proposal within **one year** of the termination for convenience. FAR 49.206-1; 52.249-2(j); Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637 (Fed. Cir. 1989) ("we cannot hold that Congress wanted to prevent parties from agreeing to terms that would further expedite the claim resolution process."); Industrial Data Link Corp., ASBCA No. 49348, 98-1 BCA ¶ 29,634, aff'd 194 F.3d 1337 (Fed. Cir., 1999); Harris Corp., ASBCA No. 37940, 90-3 BCA ¶ 23,257.
- b. Timely submittal is defined as mailing the proposal within one year after receipt of the termination notice. Voices R Us, Inc., ASBCA No. 51565, 99-1 BCA ¶ 30,213 (denying Government's summary judgment motion for failure to provide evidence that fax notice of termination was sent to and received by contractor); Jo-Bar Mfg. Corp., ASBCA No. 39572, 93-2 BCA ¶ 25,756 (finding timely mailing despite lack of government receipt).
- c. If a contractor fails to submit its termination settlement proposal within the required time period, or any extension granted by the contracting officer, the contracting officer may then unilaterally determine the amount due the contractor. FAR 49.109-7.
- d. Refusal to grant an extension of time to submit a settlement proposal is not a decision that can be appealed. Cedar Constr., ASBCA No. 42178, 92-2 BCA ¶ 24,896.

B. Amount of Settlement.

1. Methods of settlement. FAR 49.103.
  - a. Bilateral negotiations between the contractor and the government.
  - b. Unilateral determination of the government. FAR 49.109-7. This method is appropriate only when the contractor fails to submit a proposal or a settlement cannot be reached by agreement.

2. Bases of settlement. The two bases for settlement proposals are the inventory basis (the preferred method), and the total cost basis. FAR 49.206-2.
  - a. Inventory basis. Settlement proposal must itemize separately:
    - (1) Metals, raw materials, purchased parts, work in process, finished parts, components, dies, jigs, fixtures, and tooling, at purchase or manufacturing cost;
    - (2) Charges such as engineering costs, initial costs, and general administrative costs;
    - (3) Costs of settlements with subcontractors;
    - (4) Settlement expenses; and
    - (5) Other proper charges;
    - (6) An allowance for profit or adjustment for loss must be made to complete the gross settlement proposal.
  - b. Total cost basis. Used only when approved in advance by the TCO and when use of inventory basis is impracticable or will unduly delay settlement, as when production has not commenced and accumulated costs represent planning and preproduction expenses.
3. Convenience termination settlements are based on costs incurred in the performance of terminated work, plus a fair and reasonable profit on the incurred costs, plus settlement expenses. See FAR 31.205-42; Teems, Inc. v. General Services Administration, GSBICA No. 14090, 98-1 BCA ¶ 29,357.
4. The contractor has the burden of establishing its proposed settlement amount. FAR 49.109-7(c); American Geometrics Constr. Co., ASBCA No. 37734, 92-1 BCA ¶ 24,545.



5. As a general rule, a termination for convenience converts the terminated portion of a fixed-price contract to a cost-reimbursement type of contract, so costs on the settlement proposal are determined under FAR Part 31 Cost Principles and Procedures. See FAR 31.205-42 – Termination costs (these principles to be used in conjunction with other cost principles in Subpart 31.2), which lists the following categories of costs:
  - a. Common items;
  - b. Costs continuing after termination;
  - c. Initial costs;
  - d. Loss of useful value of special tooling and machinery;
  - e. Rental under unexpired leases;
  - f. Alteration of leased property;
  - g. Settlement expenses; and
  - h. Subcontractor claims.
6. The cost principles must be applied subject to the fairness principle set forth at FAR 49.201(a), which states:
  - a. A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. See Ralcon, Inc., ASBCA No. 43176, 94-2 BCA ¶ 26,935 (rejecting contracting officer's use of DFARS weighted guidelines, and instead requiring use of factors at FAR 49.202 to determine reasonable profit).

- b. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement. See Codex Corp. v. United States, 226 Ct. Cl. 693 (1981) (board decision disallowing pre-contract costs based on strict application of cost principles was remanded for further consideration by the board based on the court's determination that cost principles must be applied "subject to" the fairness concept in FAR 49.201). See also J.W. Cook & Sons, ASBCA No. 39691, 92-3 BCA ¶ 25,053 (board definition of "fairness").
- 7. Cost of Termination Inventory. Except for normal spoilage and except to the extent that the government assumed the risk of loss, the Contracting Officer shall exclude from the amounts due the contractor the fair value of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government. FAR 52.249-2(h). See Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) (contractor can't recover "simply by pleading ignorance" of fate of materials); Industrial Tectonics Bearings Corp. v. United States, 44 Fed. Cl. 115 (1999) ("fair value" means "fair market value" and not the amount sought by the contractor).
- 8. Common items.
  - a. FAR 31.205-42(a) provides that "[t]he costs of items reasonably usable on the contractor's other work shall not be allowable unless the contractor submits evidence that the items could not be retained at cost without sustaining a loss."
  - b. Courts and boards have applied this provision to more than just materiel costs. Dairy Sales Corp. v. United States, 593 F.2d 1002 (Ct. Cl. 1979) (cost of butter wrapping machine not allowed in a partial termination of a butter packing contract); Hugo Auchter GmbH, ASBCA No. 39642, 91-1 BCA ¶ 23,645 (general purpose off-the-shelf computer equipment).

9. Subcontract Settlements. FAR 49.108.
  - a. Upon termination of a prime contract, the prime and each subcontractor are responsible for prompt settlement of the settlement proposals of their immediate subcontractors. FAR 49.108-1.
  - b. Such subcontractor recovery amounts are allowable as part of the prime's termination for convenience settlement with the government. FAR 31.205-42(h).
  - c. The TCO shall examine each subcontract settlement to determine that it was arrived at in good faith, is reasonable in amount, and is allocable to the terminated portion of the contract. FAR 49.108-3(c). A contractor's settlement with a subcontractor must be done at "arm's-length", or it may be disallowed. Bos'n Towing & Salvage Co., ASBCA No. 41357, 92-2 BCA ¶ 24,864 (denying claim for costs of terminating charter of tug boats).
10. Offsets. See Applied Companies v. United States, 37 Fed. Cl. 749 (1997) (Army properly withheld \$1.9 million from termination settlement due to overpayments on another contract).
11. Settlement Expenses. FAR 31.205-42(g).
  - a. Accounting, legal, clerical, and similar costs reasonably necessary for:
    - (1) The preparation and presentation, including supporting data, of settlement claims to the contracting officer; and
    - (2) The termination and settlement of subcontracts.
  - b. Reasonable costs for the storage, transportation, protection, and disposition of property acquired or produced for the contract.

- c. Indirect costs related to salary and wages incurred as settlement expenses in a and b above; normally limited to payroll taxes, fringe benefits, occupancy costs, and immediate supervision costs.

12. Loss Contracts.

- a. A contracting officer may not allow profit in settling a termination claim if it appears that the contractor would have incurred a loss had the entire contract been completed. FAR 49.203.
- b. If the contractor would have suffered a loss on the contract in the absence of the termination for convenience, the contractor may recover only the same percentage of costs incurred as would have been recovered had the contract gone to completion. The rate of loss is applied to costs incurred to determine the cost recovery. FAR 49.203.
- c. The government has the burden of proving that the contractor would have incurred a loss at contract completion. Balimoy Mfg. Co. of Venice, ASBCA Nos. 47140 and 48165, 98-2 BCA ¶ 30,017, aff'd, 2000 U.S. App. LEXIS 26702 (Fed. Cir. 2000); R&B Bewachungs, GmbH, ASBCA No. 42214, 92-3 BCA ¶ 25,105.
- d. The target price of the fixed items, rather than the ceiling price, is used to compute the loss adjustment ratio for a convenience termination of a contract with both firm fixed price items and fixed price incentive fee line items. Boeing Defense & Space Group, ASBCA No. 51773, 98-2 BCA ¶ 30,069.

C. Special Considerations.

- 1. Merger. Claims against the government are generally merged with the termination for convenience settlement proposal; therefore, it is not necessary to distinguish equitable adjustment costs from normal performance costs unless the contract is in a loss status. Worsham Constr. Co., ASBCA No. 25907, 85-2 BCA ¶ 18,016.

2. Equitable adjustments. In cases of partial terminations a contractor may request an equitable adjustment for the continued portion of the contract. See 52.249-2(l) (requiring proposal to be submitted within 90 days of effective date of termination unless extended in writing by KO); Varo, Inc., ASBCA Nos. 47945, 47946, 98-1 BCA ¶ 29,484 (affirmative defense of untimeliness waived where not raised until third day of hearing).
3. Mutual fault. If both the government and the contractor are responsible for the causes resulting in termination of a contract, contractors have been denied full recovery of termination costs.
  - a. In Dynallectron Corp. v. United States, 518 F.2d 594 (Ct. Cl. 1975), the court allowed the contractor only one-half of the allowable termination for convenience costs because the contractor was at fault in continuing to incur costs while trying to meet impossible government specifications without notifying the government of its efforts.
  - b. In Insul-Glass, Inc., GSBICA No. 8223, 89-1 BCA ¶ 21,361, the board denied termination for convenience recovery because of the contractor's deficient administration of the contract. The board noted that under the default clause, if the default is determined to be improper, "the rights and obligations of the parties shall be the same as if a notice of termination for convenience of the government had been issued. We may exercise our equitable powers, however, to fashion, in circumstances where both parties share in the blame for the predicament which engenders an appeal, a remedy which apportions costs fairly."
4. When does a T4C proposal become a claim?
  - a. Once the parties reach an "impasse" in settlement negotiations, a request that the contracting officer render a final decision is implicit in the contractor's settlement proposal.

- b. Once the parties reach an impasse, the proposal becomes a claim under the Contract Disputes Act. James M. Ellet Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996); Rex Systems, Inc. v. Cohen, 224 F.3d 1367 (Fed. Cir. 2000) (no impasse entitling contractor to interest despite taking 2 ½ years to settle the termination); Mediav Interactive Technologies, Inc., ASBCA No. 43961, 99-2 BCA ¶ 30,318.

D. Limitations on Termination for Convenience Settlements.

- 1. Overall contract price for fixed-price contracts.
  - a. The total settlement may not exceed the contract price (less payments made or to be made under the contract) - plus the amount of the settlement expenses. FAR 49.207; FAR 52.249-2; Tom Shaw, Inc., ENG BCA No. 5540, 93-2 BCA ¶ 25,742. See also Alta Constr. Co., PSBCA No. 1463, 92-2 BCA ¶ 24,824.
  - b. Compare Okaw Indus., ASBCA No. 17863, 77-2 BCA ¶12,793 (the contract price of items terminated on an indefinite quantity contract is the price of the ordered quantity, not of the estimated quantity, where the government has ordered the minimum quantity) with Aviation Specialists, Inc., DOT BCA No. 1967, 91-1 BCA ¶ 23,534 (the only reasonable measure of the maximum recovery under a requirements contract is the government estimate.)
- 2. Add the cost of valid pending claims for government delay, defective specifications, etc., to the original contract price to establish the "ceiling" of convenience termination recovery. See, e.g., Wolfe Constr. Co., ENG BCA No. 5309, 88-3 BCA ¶ 21,122.
- 3. A contractor is not entitled to anticipatory profits or consequential damages. FAR 49.202; Dairy Sales Corp. v. United States, 593 F.2d 1002 (Ct. Cl. 1979); Centennial Leasing Corp., ASBCA No. 49217, 96-2 BCA ¶ 28,571.

E. Fiscal Considerations

1. An agency must analyze each contract that it plans to terminate for convenience to determine whether termination for convenience or completion of the contract is less costly or otherwise in the best interests of the government.
2. An agency must determine whether the convenience termination settlement would be governed by:
  - a. Standard FAR convenience termination clause provisions, or
  - b. Contract specific terms, such as termination ceilings, multi-year contract termination costs, or other specific contractual terms.
3. An agency must determine how to dispose of the funds obligated for the terminated contract.
  - a. No continuing bona fide need. The contracting officer is responsible for deobligating all funds in excess of the estimated termination settlement costs. FAR 49.101(f); DOD Financial Management Regulation 7000.14-R, vol. 3, ch. 8, para. 080512.
  - b. Continuing bona fide need. The general rule is that a prior year's funding obligation is extinguished upon termination of a contract, and funds will **not** remain available to fund a replacement contract in a subsequent year where a contracting officer terminates a contract for the convenience of the government.
    - (1) GAO Exceptions to the general rule.

- (a) Funds originally obligated in one fiscal year for a contract that is later terminated for convenience in response to a court order or to a determination by the General Accounting Office or other competent authority that the award was improper, remain available in a subsequent fiscal year to fund a replacement. Funding of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988).
  - (b) Funds originally obligated in one fiscal year for a contract that is later terminated for convenience as a result of the contracting officer's determination that the award was clearly erroneous, remain available in a subsequent fiscal year to fund a replacement. Navy, Replacement Contract, B-238548, 70 Comp. Gen. 230 (1991).
- (2) The two rules apply subject to the following conditions:
- (a) The original award was made in good faith;
  - (b) The agency has a continuing bona fide need for the goods or services involved;
  - (c) The replacement contract is of the same size and scope as the original contract;
  - (d) The replacement contract is executed without undue delay after the original contract is terminated for convenience; and,
  - (e) If the termination for convenience is issued by the contracting officer, the contracting officer's determination that the award was improper is supported by findings of fact and law.
- (3) Bid Protests or other challenge. 31 U.S.C. § 1558; DFAS-IN 37-1, para. 080608.

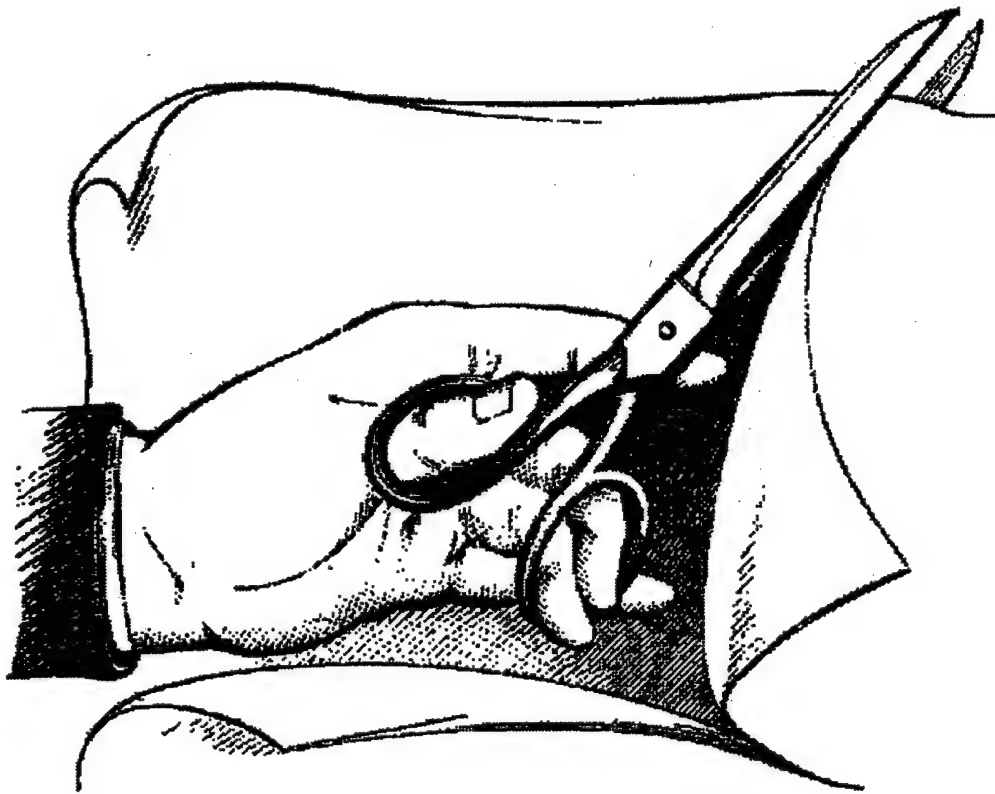


- (a) Funds available at the time of protest or other action filed in connection with a solicitation for, proposed award of, or award of such contract, remain available for obligation for 100 days after the date on which the final ruling is made on the protest or other action.
- (b) A protest or other action consists of a protest filed with the General Accounting Office, or an action commenced under administrative procedures or for a judicial remedy if the action involves a challenge to—
  - (i) a solicitation for a contract;
  - (ii) a proposed award for a contract;
  - (iii) an award of a contract; or
  - (iv) the eligibility of an offeror or potential offeror for a contract or of the contractor awarded the contract; and
  - (v) commencement of the action delays or prevents an executive agency from making an award of a contract or proceeding with a procurement.
- (c) A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such an appeal or request, whichever is later. 31 U.S.C. § 1558.

- (1) A request for reconsideration of a GAO protest must be made within ten days after the basis for reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.14(b).
- (2) The appeal of a protest decision of a district court or the Court of Federal Claims must be filed with the Court of Appeals for the Federal Circuit within 60 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(B).

**V. CONCLUSION.**

***Chapter 23***  
**Contract Terminations  
for Default**



***146th Contract Attorneys Course***

## CHAPTER 23

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## CHAPTER 23

### CONTRACT TERMINATIONS FOR DEFAULT

#### I. INTRODUCTION.

- A. **General.** Courts and boards hold the government to a high standard when terminating a contract for default because of the adverse impact such an action has on a contractor. Indeed, judges often describe terminations for default as a "contractual death sentence." Unfortunately, government officials frequently fail to follow prescribed procedures, rendering default terminations subject to reversal on appeal. Prior to issuing a default termination notice, contracting officers must have a valid basis for the termination, must issue proper notices, must account for the contractor's excusable delay, must act with due diligence, and must make a reasonable determination while exercising independent judgment. Attorneys play a critical role in this process, ensuring that all legal requirements are met and the termination decision receives the care and attention it deserves.
- B. **Definition of Default.** A contractor's unexcused present or prospective failure to perform in accordance with the contract's terms, specifications, or delivery schedule constitutes contractual default under government contracts. See FAR 49.401.
- C. **Review of Default Terminations by the Courts and Boards.**
  - 1. "[A] termination for default is a drastic sanction that should be imposed upon a contractor only for good cause and in the presence of solid evidence." Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987); Mega Constr. Co. v. United States, 25 Cl. Ct. 735 (1992).

MAJ Jon Guden  
146th Contract Attorneys Course  
April/May 2001

2. Burden of Proof.

- a. It is the government's burden to prove, by a preponderance of the evidence, that the termination for default was proper. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987); Walsky Constr. Co., ASBCA No. 41541, 94-1 BCA ¶ 26,264.
- b. A contractor's technical default is not determinative of its propriety. The Government must exercise its discretion reasonably to terminate a contract for default. Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987).
- c. Once the government has met its burden of demonstrating the appropriateness of the default, the contractor has the burden of proof (persuasion?) that its failure to perform was the result of causes beyond its control and without fault on its part. International Elec. Corp. v. United States, 646 F.2d 496 (Ct. Cl. 1981); Composite Int'l, Inc., ASBCA No. 43359, 93-2 BCA ¶ 25,747.

II. THE RIGHT TO TERMINATE FOR DEFAULT.

A. Contractual Rights.

1. The FAR contains various Default clauses for use in government contracts that identify the conditions that permit the government to terminate a contract for default.
2. The clauses contain different bases for termination and different notice requirements. For example, the Fixed-Price Supply and Service clause (FAR 52.249-8) is different from the Fixed-Price Construction clause (FAR 52.249-10).

B. Common-Law Doctrine.

1. The standard FAR Default clauses provide: "The rights and remedies of the government in this clause are in addition to any other rights and remedies provided by law or under this contract." See FAR 52.249-8 and FAR 52.249-10.
2. Courts commonly cite the above-quoted provision to support the government's termination of a contract for default based on common-law doctrines such as anticipatory repudiation. Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985).

III. GROUNDS FOR TERMINATION.

A. Failure to Deliver or Perform on Time.

1. This ground is commonly referred to as an "(a)(1)(i)" termination. FAR 52.249-8(a)(1)(i); 52.249-10(a).
2. Generally, time is of the essence in all government contracts containing fixed dates for delivery or performance. Devito v. United States, 413 F.2d 1147 (Ct. Cl. 1969); Kit Pack Co., ASBCA No. 33135, 89-3 BCA ¶ 22,151. Upon non-delivery of a contract requirement, the government has an immediate right to terminate the contract. Vought Aircraft Company, ASBCA No. 38,092, 96-2 BCA ¶ 28,321.
3. Compliance with specifications.
  - (a) The government is entitled to strict compliance with its specifications. Mega Constr. Co. v. United States, 25 Cl. Ct. 735 (1992); Kurz-Kasch, Inc., ASBCA No. 32486, 88-3 BCA ¶ 21,053.



- (b) However, courts and boards recognize the common-law principles of **substantial compliance** (supply) and **substantial completion** (construction) to protect the contractor where timely performance departs in minor respects from that required by the contract. If the contractor substantially complies with the contract, the government must give the contractor additional time to correct the defects prior to terminating for default. Radiation Technology, Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966); FD Constr. Co., ASBCA No. 41441, 91-2 BCA ¶ 23,983 (contractor not protected under doctrine of substantial completion because it abandoned the work and refused to complete punchlist and administrative items).

B. Failure to Make Progress so as to Endanger Performance.

1. Supply and Service. The Default clauses for fixed-price supply and service contracts and cost-reimbursement contracts provide for termination when the contractor fails to make progress so as to endanger performance. This is commonly referred to as an "(a)(1)(ii)" termination. FAR 52.249-8(a)(1)(ii); FAR 52.249-6(a).
2. Construction. The Default clause for fixed-price construction contracts provides for termination when the contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in the contract. FAR 52.249-10(a).
3. Proof.
  - a. The government is not required to show that it was impossible for the contractor to complete performance. California Dredging Co., ENG BCA No. 5532, 92-1 BCA ¶ 24,475.

- b. Rather, the contracting officer must have a **reasonable belief** that there is no likelihood that the contractor can perform the entire contract effort within the time remaining for contract performance. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) (upholding T4D conversion where government did not determine whether contractor could complete work within the required time, or determine how long it would take a follow-on contractor to do the work); Pipe Tech, Inc., ENG BCA No. 5959, 94-2 BCA ¶ 26,649 (termination improper where 92% of contract performance time remained and reprourement contractor fully performed within the time allowed in defaulted contract).
- c. Prior to termination, the contracting officer should analyze progress problems against a specified completion date, adjusted to account for any government-caused delays. Technocratica, ASBCA No. 44134, 94-2 BCA ¶ 26,606 (termination for "poor progress" improper).

C. Failure to Perform Any Other Provision of the Contract.

- 1. Supply and Service. The default clause in fixed-price supply and service contracts specifically provides this ground for termination. It is commonly referred to as an "(a)(1)(iii)" termination. FAR 52.249-8(a)(1)(iii).
- 2. Construction. This basis does not exist under the construction clauses. See FAR 52.249-10. However, the courts and boards may sustain default terminations of construction contracts based on inability to perform and/or prosecute the work with the diligence required to insure timely completion. Engineering Technology Consultants, S.A., ASBCA No. 43454, 94-1 BCA ¶ 26,586 (failure to maintain the proper insurance coverage).
- 3. Courts and boards will not sustain a default termination unless that "other provision" of the contract is a "material" or "significant" requirement. Precision Prods., ASBCA No. 25280, 82-2 BCA ¶ 15,981 (noncompliance with first article manufacture requirements not deemed material under facts).

4. Examples.

- a. Failure to employ drivers with valid licenses. Maywood Cab Service, Inc., VACAB No. 1210, 77-2 BCA ¶ 12,751.
- b. Failure to obtain liability insurance. UMM, Inc., ENG BCA No. 5330, 87-2 BCA ¶ 19,893 (mowing services contract).
- c. Violation of the Buy American Act. HR Machinists Co., ASBCA No. 38440, 91-1 BCA ¶ 23,373.
- d. Failure to comply with statement of work. 4-D and Chizoma, Inc., ASBCA Nos. 49550, 49598, 00-1 BCA ¶ 30,782 (failure to properly videotape sewer line).
- e. Failure to retain records under Payrolls and Basic Records Clause justified default under the Davis-Bacon Act. Kirk Bros. Mech. Contractors, Inc. v. Kelso, 16 F.3d 1173 (Fed. Cir. 1994).

D. Other Contract clauses providing independent basis to terminate for default.

- 1. FAR 52.203-3 (Gratuities clause);
- 2. FAR 52.209-5 (Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters). See Spread Information Sciences, Inc., ASBCA No. 48438, 96-1 BCA ¶ 27,996.
- 3. FAR 52.222-26 (Equal Opportunity clause);
- 4. FAR 52.228-1 (Bid Guarantee clause);
- 5. FAR 52.246-2 (Inspection clause).

E. Anticipatory Repudiation.

1. Each party to a contract has the common-law right to terminate a contract upon actual or anticipatory repudiation of the contract by the other party. Restatement (Second) of Contracts § 250; Uniform Commercial Code § 210; Dingley v. Oler, 117 U.S. 490 (1886).
2. This common-law basis for default applies to all government contracts, since contract clauses generally do not address or supersede this principle. Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985).
  - a. Anticipatory repudiation must be express. United States v. DeKonty Corp., 922 F.2d 826 (Fed. Cir. 1991) (must be absolute refusal, distinctly and unequivocally communicated); Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (no repudiation where contractor did not continue performance due to government's failure to issue appropriate instructions).
  - b. Anticipatory repudiation must be unequivocal and manifest either a clear intention not to perform or an inability to perform the contract. Ateron Corp., ASBCA No. 46352, 94-3 BCA ¶ 27,229 (contractor's statement that continued contract performance is impossible constituted repudiation). Compare Swiss Prods., Inc., ASBCA No. 40031, 93-3 BCA ¶ 26,163 (contractor's refusal to perform until government provided advance payments constitutes repudiation), with Engineering Professional Servs., Inc., ASBCA No. 39164, 94-2 BCA ¶ 26,762 (no repudiation where contractor's statement that "government financing must be provided to assure contract completion" was not precondition to resumed performance).
3. Abandonment is actual repudiation. Compare Ortec Sys., Inc., ASBCA No. 43467, 92-2 BCA ¶ 24,859 (termination proper when work force left site and contractor failed to respond to phone calls), with Western States Mgmt. Servs., Inc., ASBCA No. 40212, 92-1 BCA ¶ 24,714 (no abandonment when contractor was unable to perform by unreasonable start date established after disestablishment of original start date).

F. Demand For Assurance.

1. Failure by one party to give adequate assurances that it would complete a contract is a valid basis for a default termination under common-law. Restatement (Second) of Contracts § 251; Uniform Commercial Code § 2-609.
2. This basis for termination applies to government contracts. Danzig v. AEC Corp., 224 F.3d 1333 (Fed. Cir. 2000) (AEC's letter responses and conduct following the Navy's cure notice supported T4D); Engineering Professional Servs., Inc., ASBCA No. 39164, 94-2 BCA ¶ 26,762; National Union Fire Ins. Co., ASBCA No. 34744, 90-1 BCA ¶ 22,266. But see Ranco Constr., Inc. v. Gen. Servs. Admin., GSBGA No. 11923, 94-2 BCA ¶ 26,678 (board questions whether demand for assurance under UCC § 2-609 applies to construction contracts).
3. The government's "cure notice" may be the equivalent of a demand for assurance. Hannon Elec. Co. v. United States, 31 Fed. Cl. 135 (1994) (contractor's failure to provide adequate assurance in response to cure notice justified default termination); Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082.

G. Defending a termination action.

1. When a contractor appeals a final decision terminating a contract for default, the government is not bound by the contracting officer's reasons for the termination as stated in the termination notice.
2. If a proper ground for the default termination existed at the time of the termination, regardless of whether the contracting officer relied on or was even aware of that basis, the termination is proper. See Kirk Bros. Mech. Contractors, Inc. v. Kelso, 16 F.3d 1173 (Fed. Cir. 1994) (violations of Davis-Bacon Act); Joseph Morton Co. v. United States, 757 F.2d 1273 (Fed. Cir. 1985) (fraud); Quality Granite Constr. Co., ASBCA No. 43846, 93-3 BCA ¶ 26,073 (government not required to give notice to contractor when unaware of basis for termination).

#### IV. NOTICE REQUIREMENTS.

##### A. Cure Notice.

1. For fixed-price supply or service contracts, research and development contracts, and cost-reimbursement contracts, the government must notify the contractor, in writing, of its failure to make progress ((a)(1)(ii)) or its failure to perform any other provision of the contract ((a)(1)(iii)) and give the contractor 10 days in which to cure such failure before it may terminate the contract. FAR 52.249-6; FAR 52.249-8; FAR 52.249-9. See FAR 49.607(a).
  - a. A proper cure notice must inform the contractor in writing:
    - (1) That the government intends to terminate the contract for default;
    - (2) Of the reasons for the termination; and
    - (3) That the contractor has a right to cure the specified deficiencies within the cure period (10 days).
  - b. To support a default decision, the cure notice must clearly identify the nature and extent of the performance failure. Lanzen Fabricating, Inc., ASBCA No. 40328, 93-3 BCA ¶ 26,079 (show cause notice did not serve as cure notice for purposes of (a)(1)(ii) termination because it didn't specify failures to be cured); Insul-Glass, Inc., GSBCA No. 8223, 89-1 BCA ¶ 21,361(notice directed contractor to provide acceptable drawings without specifying what the contractor had to do to make the drawings acceptable).
  - c. The government must give the contractor a minimum of ten days to cure the deficiency. Red Sea Trading Assoc., ASBCA No. 36360, 91-1 BCA ¶ 23,567 (the ten day period need not be specifically stated in the notice if a minimum of ten days was actually afforded the contractor).

2. The government may terminate cost-reimbursement contracts for default if the contractor defaults in performing the contract and fails to cure the defect in performance within ten days of receiving a proper cure notice from the contracting officer. FAR 52.249-6(a)(2).
  3. A cure notice is **NOT** required before:
    - a. Terminating for failure to timely deliver goods. Delta Indus., DOT BCA No. 2602, 94-1 BCA ¶ 26,318 (government rejected desks that did not meet contract specifications).
    - b. Terminating pursuant to an independent clause of the contract not requiring notice. See "K" Servs., ASBCA No. 41791, 92-1 BCA ¶ 24,568 (default under FAR 52.209-5 for false certification regarding debarment status of contractor's principal).
    - c. Terminating based on the contractor's anticipatory repudiation of the contract. Beeston, Inc., ASBCA No. 38969, 91-3 BCA ¶ 24,241; Scott Aviation, ASBCA No. 40776, 91-3 BCA ¶ 24,123.
    - d. Terminating construction contracts. FAR 52.249-10. However, the government frequently provides the contractor a cure notice prior to terminating these contracts. See Hillebrand Constr. of the Midwest, Inc., ASBCA No. 45853, 95-1 BCA ¶ 27,464 (failure to provide submittals); Engineering Technology Consultants, S.A., ASBCA No. 43454, 94-1 BCA ¶ 26,586 (concerning contractor's failure to provide proof of insurance).
- B. **Show Cause Notice.** If a termination for default appears appropriate, the government **should, if practicable**, notify the contractor in writing of the possibility of the termination. FAR 49.402-3(e)(1). This notice is referred to as a "show cause" notice. FAR 49.607.
1. The show cause notice should:
    - a. Call the contractor's attention to its contractual liabilities if the contract is terminated for default.

- b. Request the contractor to show cause why the contract should not be terminated for default.
  - c. State that the failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists.
- 2. The default clauses do not require the use of a show cause notice. See FAR 52.249-8 (Supply and Service); FAR 52.249-9 (Research and Development); FAR 52.249-10 (Construction); Alberts Assocs., ASBCA No. 45329, 95-1 BCA ¶ 27,480.
  - a. The contracting officer is not required to include every subsequently advanced reason for the termination in the show cause notice because the government is under no obligation to issue the notice. Sach Sinha and Associates, Inc., ASBCA No. 46916, 96-2 BCA ¶ 28,346.
  - b. However, the courts and boards may require a "show cause" notice if its use was practicable. Udis v. United States, 7 Cl. Ct. 379 (1985); Enginetics Corp., ASBCA No. 40834, 92-2 BCA ¶ 24,965 (denying government's motion for summary judgment while noting government's failure to issue show cause notice).
  - c. If the government issues a show cause notice, it need not give the contractor ten days to respond. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448 (six days was sufficient in construction default case).

## **V. CONTRACTOR DEFENSES TO A TERMINATION FOR DEFAULT.**

### **A. Excusable Delay.**

- 1. A contractor's failure to deliver or to perform on a fixed-price supply or service contract is excusable if the failure is beyond the control and without the fault or negligence of the contractor. FAR 52.249-8(c).



2. For construction contracts, the contractor is excused if the delay arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor, and the contractor, within 10 days from the beginning of any delay (unless extended by the contracting officer), notifies the contracting officer in writing of the causes of delay. FAR 52.249-10(b).
3. The contractor has the burden of proving that its failure to perform was excusable. The contractor must show:
  - a. The occurrence of an event was unforeseeable (construction only), beyond its control, and without its fault or negligence. Local Contractors, Inc., ASBCA No. 37108, 92-1 BCA ¶ 24,491; Charles H. Siever, ASBCA No. 24814, 83-1 BCA ¶ 16,242.
  - b. Timely performance was actually prevented by the claimed excuse. Sonora Mfg., ASBCA No. 31587, 91-1 BCA ¶ 23,444; Beekman Indus., ASBCA No. 30280, 87-3 BCA ¶ 20,118.
  - c. The specific period of delay caused by the event. Conquest Constr., Inc., PSBCA No. 2350, 90-1 BCA ¶ 22,605.
4. The Default clauses specifically identify some causes of excusable delay. These include:
  - a. Acts of God (aka "force majeure") or of the public enemy. See Nogler Tree Farm, AGBCA No. 81-104-1, 81-2 BCA ¶ 15,315 (eruption of Mount St. Helens volcano); Centennial Leasing v. Gen. Servs. Admin., GSBCA No. 12037, 94-1 BCA ¶ 26,398 (death of chief operating officer not an act of God).
  - b. Acts of the government in either its sovereign or contractual capacity.

- (1) Sovereign capacity refers to public acts of the government not directed to the contract. Home Entertainment, Inc., ASBCA No. 50791, 99-2 BCA ¶ 30,550 (analysis of "sovereign act" defense relating to expulsion orders in Panama); Woo Lim Constr. Co., ASBCA No. 13887, 70-2 BCA ¶ 8451 (imposition of security restrictions in a hostile area).
  - (2) Acts of the government in its contractual capacity are most common and include delays caused by such things as defective specifications, unreasonable government inspections and late delivery of government furnished property. See Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (government failed to respond to contractor's request for directions); John Glenn, ASBCA No. 31260, 91-3 BCA ¶ 24,054 (government issued faulty performance directions).
- c. Fires. Hawk Mfg. Co., GSBCA No. 4025, 74-2 BCA ¶ 10,764 (lack of facilities rather than a plant fire caused contractor's failure to timely deliver).
  - d. Floods. Wayne Constr., ENG BCA No. 4942, 91-1 BCA ¶ 23,535 (storm damage to a dike entitled contractor to time extension).
  - e. Epidemics and quarantine restrictions. Ace Elecs. Assoc., ASBCA No. 11496, 67-2 BCA ¶ 6456 (denying relief based on allegation that flu epidemic caused a 30% to 40% rate of absenteeism, without showing that it contributed to delay).
  - f. Strikes, freight embargoes, and similar work stoppages. Woodington Corp., ASBCA No. 37885, 91-1 BCA ¶ 23,579 (delay not excused where steel strike at U.S. Steel had been ongoing for two months prior to contractor's bid, subcontractor ordered steel after strike ended, and other steel manufacturers were not on strike).

- g. Unusually severe weather. Only unusually severe weather, as compared to the past weather in the area for that season, excuses performance. See Aulson Roofing, Inc., ASBCA No. 37677, 91-2 BCA ¶ 23,720 (contractor not entitled to day for day delay because some rain delay was to be expected); TCH Indus., AGBCA No. 88-224-1, 91-3 BCA ¶ 24,364 (eight inches of snow in northern Idaho in November is neither unusual nor unforeseeable).
- h. Acts of another contractor in performance of a contract for the government (construction contracts). FAR 52.249-10(b)(1); Modern Home Mfg. Corp., ASBCA No. 6523, 66-1 BCA ¶ 5367 (housing contractor entitled to extension because site not prepared in accordance with contract specifications).
- i. Defaults or delays by subcontractors or suppliers.
  - (1) Construction. If the delay of a subcontractor or supplier at any tier arises from unforeseeable causes beyond the control and without the fault or negligence of both the contractor and the subcontractor or supplier, and the contractor notifies the contracting officer within ten days from the beginning of the delay, it may be excusable. FAR 52.249-10(b).
  - (2) Supply and Services contracts, and cost-reimbursement contracts. The general rule is that if a failure to perform is caused by the default of a subcontractor or supplier at any tier, the default is excusable if:
    - (a) The cause of the default was beyond the control and without the fault or negligence of either the contractor or the subcontractor; and,

- (b) The subcontracted supplies or services were not obtainable from other sources in time for the contractor to meet the required delivery schedule. FAR 52.249-8(d); FAR 52.249-6(b); FAR 52.249-14(b); Progressive Tool Corp., ASBCA No. 42809, 94-1 BCA ¶ 26,413 (contractor failed to show it made all reasonable attempts to locate an alternate supplier); CM Mach. Prods., ASBCA No. 43348, 93-2 BCA ¶ 25,748 (default upheld where plating could have been provided by another subcontractor but prime refused to pay higher price).

5. Additional excuses commonly asserted by contractors include:

- a. Material breach of contract by the government. Todd-Grace, Inc., ASBCA No. 34469, 92-1 BCA ¶ 24,742 (breach of implied duty not to interfere with contractor); Bogue Elec. Mfg. Co., ASBCA No. 25184, 86-2 BCA ¶ 18,925 (defective government-furnished equipment).
- b. Lack of financial capability. Contractors are responsible for having sufficient financial resources to perform a contract.
  - (1) Generally, this is not an excuse. Local Contractors, Inc., ASBCA No. 37108, 92-1 BCA ¶ 24,491 (contractor had deteriorating financial base unconnected to the contract).
  - (2) If the financial difficulties are caused by wrongful acts of the government, however, the delay may be excused. Nexus Constr. Co., ASBCA No. 31070, 91-3 BCA ¶ 24,303 (default converted because government's refusal to release progress payments constituted material breach of contract).
- c. Bankruptcy. Although filing a petition of bankruptcy is not an excuse, it precludes termination. Communications Technology Applications, Inc., ASBCA No. 41573, 92-3 BCA ¶ 25,211 (government's right to terminate stayed when bankruptcy filed, not when government notified).

- d. Small business. Kit Pack Co., ASBCA No. 33135, 89-3 BCA ¶ 22,151 (no excuse for failure to meet delivery date).
  - e. Impossibility or Commercial impracticability. To establish commercial impracticability, the contractor must show it can perform only at excessive and unreasonable cost—simple economic hardship is not sufficient. CleanServ Executive Services, Inc., ASBCA No. 47781, 96-1 BCA ¶ 28,027. Compare Soletanche Rodio Nicholson (JV), ENG BCA No. 5796, 94-1 BCA ¶ 26,472 (performance might take 17 years and cost \$400 million, rather than 2 years and \$16.9 million), with CM Mach. Prods., ASBCA No. 43348, 93-2 BCA ¶ 25,748 (no commercial impracticability where costs increased 105%).
6. If a delay is found to be excusable, the contractor is entitled to additional time and/or money. Batteast Constr. Co., ASBCA No. 35818, 92-1 BCA ¶ 24,697. **NOTE** - Constructive acceleration of the delivery date often occurs when the contracting officer, using a threat of termination, directs compliance with the contract delivery or performance date without an extension for the time period attributable to an excusable delay.

B. Waiver.

- 1. Waiver of the right to default occurs if (1) the government fails to terminate a contract within a reasonable period of time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the government's knowledge and implied or express consent. Devito v. United States, 413 F.2d 1147 (Ct. Cl. 1969); S.T. Research Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838; Motorola Computer Sys., Inc., ASBCA No. 26794, 87-3 BCA ¶ 20,032.
- 2. Absent government manifestation that a performance date is no longer enforceable, the waiver doctrine generally does not apply to construction contracts. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448.

- a. Construction contracts typically include a payment clause entitling the contractor to payment for work performed subsequent to the specified completion date.
  - b. Construction contracts also typically include a liquidated damage clause that entitles the government to money for late completion.
  - c. As a consequence, detrimental reliance usually can't be found merely from government forbearance and continued contractor performance. Brent L. Sellick, ASBCA No. 21869, 78-2 BCA ¶ 13,510.
3. Reasonable period of time.
- a. Forbearance is the period of time during which the Government investigates the reasons for the contractor's failure to meet the contract requirements. The government may "forbear" for a reasonable period after the default occurs before taking some action. Reasonableness depends on the specific facts of each case. Progressive Tool Corp., ASBCA No. 42809, 94-1 BCA ¶ 26,413 (although forbearance for 42 days after show cause notice was "somewhat long," T4D sustained because government did not encourage contractor to continue working and contractor did not perform substantial work during that period).
  - b. Government actions inconsistent with forbearance may waive a delivery date. Applied Cos., ASBCA No. 43210, 94-2 BCA ¶ 26,837 (government waived delivery date for First Article Test Report by seeking information, making progress payments, directing the contractor to rerun tests, and incorporating engineering change proposals into the contract after the delivery date); Kitco, Inc., ASBCA No. 38184, 91-3 BCA ¶ 24,190 (no clear delivery schedule established after partial termination for convenience resulted in waiver of right to terminate for default based on untimely deliveries).

- c. Contracting officers should use show cause notices to avoid waiver arguments. See Charles H. Siever Co., ASBCA No. 24814, 83-1 BCA ¶ 16,242 (using timely show cause notice preserved government's right to terminate despite four month forbearance period).
4. Detrimental Reliance.
- a. The contractor must show detrimental reliance on the government's inaction before the government will be deemed to have waived the delivery schedule. Ordnance Parts Eng'g Co., ASBCA No. 44327, 93-2 BCA ¶ 25,690 (no detrimental reliance where contractor repudiated contract).
  - b. Where the contractor customarily continued performance after a missed delivery date, a board has found no inducement by the government. Electro-Methods, Inc., ASBCA No. 50215, 99-1 BCA ¶ 30,230.
5. Reestablishing the delivery schedule.
- a. The government should reestablish a delivery schedule if it believes it waived the original schedule. FAR 49.402-3(c). Proper reestablishment of a delivery schedule also reestablishes the government's right to terminate for default.
  - b. A delivery schedule can be reestablished either bilaterally or unilaterally. Sermor, Inc., ASBCA No. 30576, 94-1 BCA ¶ 26,302 (formal modification not required, but new delivery date must be reasonable and specific).
    - (1) A new delivery date established bilaterally is presumed to be reasonable. Trans World Optics, Inc., ASBCA No. 35976, 89-3 BCA ¶ 21,895; Sermor, Inc., *supra* (by agreeing to new delivery schedule, contractor waives excusable delay).

- (2) A new delivery date the government unilaterally establishes must in fact be reasonable **in light of the contractor's abilities** in order to be enforceable. Oklahoma Aerotronics, Inc., ASBCA No. 25605, 87-2 BCA ¶ 19,917 (unilateral date for first article delivery unreasonable).
  - (3) The schedule proposed by the contractor is presumed reasonable. Tampa Brass Aluminum Corp., ASBCA No. 41314, 92-2 BCA ¶ 24,865 (termination proper because unreasonable schedule was proposed by the contractor). But see S.T. Research Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838 (schedule proposed within 24 hours of contracting officer's demand, by contractor having technical problems, was not reasonable).
  - c. A cure notice, by itself, does not reestablish a waived delivery schedule. Lanzen Fabricating, ASBCA No. 40328, 93-3 BCA ¶ 26,079.
6. If a contract requires multiple deliveries, each successive increment represents a severable obligation to deliver on the contract delivery date. Thus, the government may accept late delivery of one or more installments without waiving the delivery date for future installments. Electro-Methods, Inc., ASBCA No. 50215, 99-1 BCA ¶ 30,230; Allstate Leisure Prods., Inc., ASBCA No. 40532, 94-3 BCA ¶ 26,992.

## VI. THE DECISION TO TERMINATE FOR DEFAULT.

### A. Discretionary Act.

#### 1. Standard of Review.

- a. The standard FAR clauses generally grant the government the authority to terminate, which shall be exercised only after review by contracting and technical personnel, and by counsel, to ensure propriety of the proposed action. FAR 49.402-3 (a).



- b. Contracting officers must exercise discretion. The default clauses do not **compel** termination; rather, they **permit** termination for default if such action is appropriate in the business judgment of the responsible government officials. Schlesinger v. United States, 182 Ct. Cl. 571, 390 F.2d 702 (1968) (Navy improperly terminated a contract because of pressure from a Congressional committee, rather than its own assessment of the government's and contractor's interests).
- c. Contractors may challenge the default termination decision on the basis that the terminating official abused his discretion or acted in bad faith. Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987).

2. Burden of proof.

- a. Courts and boards review the contracting officer's actions according to the circumstances as they existed at the time of the default. Local Contractors, Inc., ASBCA No. 37108, 92-1 BCA ¶ 24,491.
- b. A default termination is a drastic sanction that should be imposed only for good grounds and on solid evidence. J.D. Hedin Constr. Co. v. U.S., 408 F.2d 424 (Ct. Cl. 1969).
- c. The Government has the burden of establishing the propriety of a default termination. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987). A finding of technical default is not determinative on the issue of the propriety of a default termination. Walsky Constr. Co., ASBCA No. 41541, 94-2 BCA ¶ 26,698.
- d. Once the Government establishes that the contractor was in default, the contractor bears the burden of proving that the termination was an abuse of discretion or done in bad faith.

(1) Abuse of Discretion.

- (a) Abuse of discretion (also referred to as "arbitrary and capricious" conduct) may be ascertained by looking at the following factors:
- (i) subjective bad faith on the part of the Government;
  - (ii) no reasonable basis for the decision;
  - (iii) the degree of discretion entrusted to the deciding official;
  - (iv) violation of an applicable statute or regulation. United States Fidelity & Guaranty Co. v. U.S., 676 F.2d 622 (Ct. Cl. 1982); Quality Environment Systems, Inc., ASBCA No. 22178, 87-3 BCA ¶ 20,060.
- (b) The contractor bears the burden of showing an abuse of discretion. Walsky Constr. Co., ASBCA No. 41541, 94-1 BCA ¶ 26,264, aff'd on recon., 94-2 BCA ¶ 26,698 (lieutenant colonel's directive to the contracting officer "tainted the termination"); see also Libertatia Assoc., Inc. v. United States, 46 Fed. Cl. 702 (2000) (once default is established, burden shifts to contractor to show its failure to perform is excusable).

(2) Bad Faith.

- (a) Contractors asserting that government officials breached the contract by acting in "bad faith" must meet a higher standard of proof. The courts and boards require "**well nigh irrefragable proof**"<sup>1</sup> of "malice" or "designedly oppressive conduct" to overcome the presumption that public officials act in good faith in the exercise of their powers and responsibilities. See Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976); Apex Int'l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842, aff'd on recon., 94-2 BCA ¶ 26,852 (Navy officials acted in bad faith by "declaring war" against the contractor; contractor entitled to breach damages).
- (b) Government officials are presumed to have acted conscientiously in making a default termination decision. Mindeco Corp., ASBCA No. 45207, 94-1 BCA ¶ 26,410; Local Contractors, Inc., ASBCA No. 37108, 92-1 BCA ¶ 24,491.
- (c) Proof of bad faith requires specific intent to retaliate against or injure plaintiff to support an allegation of bad faith. Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976); Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (although government's administration of the contract was "seriously flawed," no bad faith).

B. Regulatory guidance. The FAR provides detailed procedures which the contracting officer should follow to terminate a contract.

- 1. Contracting officers should consider alternatives to termination. FAR 49.402-4. The following, among others, are available in lieu of termination for default when in the Government's interest:

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<sup>1</sup> "One COFC judge contends that the "irrefragable" (meaning "impossible to refute") standard of proof appears to exceed the beyond a reasonable doubt standard employed in criminal law cases, and would therefore insulate the government from any review by the courts. The judge went on to analyze the case by applying the Kalvar standard, that is, looking for evidence of specific intent to injure, or action taken out of animus toward, the contractor. Libertatia Assoc., Inc. v. U.S., 46 Fed. Cl. 702 (2000).

- (a) permit the contractor, the surety, or the guarantor, to continue performance under a revised schedule;
  - (b) permit the contractor to continue performance by means of a subcontract or other business arrangement;
  - (c) if the requirement no longer exists and the contractor is not liable to the government for damages, execute a no-cost termination.
- 2. The FAR provides detailed procedures for terminating a contract for default. FAR 49.402-3. When a default termination is being considered, the Government shall decide which termination action to take only after review by contracting and technical personnel, and by counsel, to ensure the propriety of the proposed action. Failure to conduct such a review, while risky, will not automatically overturn a default decision. National Med. Staffing, Inc., ASBCA No. 40391, 92-2 BCA ¶ 24,837 (contracting officer acted within her discretion despite her failure to consult with technical personnel and counsel prior to termination).
- 3. Before terminating a contractor for default, the contracting officer should comply with the pertinent notice requirements (cure notice or show cause notice). FAR 49.402-3(c)(d)(e). Additional notice to the following third parties may be required:
  - a. Surety. If a notice to terminate for default appears imminent, the contracting officer shall provide a written notice to the surety. If the contractor is subsequently terminated, the contracting officer shall send a copy of the notice to the surety. FAR 49.402-3(e)(2).
  - b. Small Business Administration. When the contractor is a small business, send a copy of any show cause or cure notice to the contracting office's small business specialist and the Small Business Regional Office nearest the contractor. FAR 49.402-3(e)(4).
- 4. FAR 49.402-3(f) states that the contracting officer shall consider the following factors in determining whether to terminate a contract for default:

- a. The terms of the contract and applicable laws and regulations.
  - b. The specific failure of the contractor and the excuses for the failure.
  - c. The availability of the supplies or services from other sources.
  - d. The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
  - e. The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.
  - f. The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.
  - g. Any other pertinent facts and circumstances.
5. Failure of the contracting officer to consider factors at FAR 49.402-3(f) may result in a defective termination. See DCX, Inc., 79 F.3d 132 (Fed. Cir. 1996) (although contracting officer's failure to consider one or more FAR 49.402-3(f) factors does not automatically require conversion to termination for convenience, such failure may aid the court or board in determining whether the contracting officer abused his discretion); Phoenix Petroleum Company, ASBCA No. 42763, 96-2 BCA ¶ 28,284 (failure to analyze FAR factors does not entitle contractor to relief--factors are not a prerequisite to a valid termination).
6. Failure to consider all information available prior to issuing a termination notice could be an abuse of discretion. Jamco Constructors, Inc., VABCA No. 3271, 94-1 BCA ¶ 26,405, aff'd on recon., 94-2 BCA ¶ 26,792 (contracting officer abused discretion by failing to reconcile contradictory information and "blindly" accepting technical representative's estimates for completion of the contract by another contractor).

7. The contracting officer must explain the decision to terminate a contract for default in a memorandum for the contract file. FAR 49.402-5. The memorandum should recount the factors at FAR 49.402-3(f).
8. The Default Termination Notice.
  - (a) Contents of the termination notice. FAR 49.102; FAR 49.402-3(g). The written notice must clearly state:
    - (1) The contract number and date;
    - (2) The acts or omissions constituting the default;
    - (3) That the contract's right to proceed further under the contract (or a specified portion of the contract) is terminated;
    - (4) That the supplies or services terminated may be purchased against the contractor's account, and that the contractor will be held liable for any excess costs;
    - (5) If the contracting officer has determined that the failure to perform is not excusable, that the notice of termination constitutes such decision, and that the contractor has the right to appeal such decision under the Disputes clause;
    - (6) That the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and
    - (7) That the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause. FAR 49.402-3(g).

- (8) FAR 49.102(a) provides that the notice shall also include any special instructions and the steps the contractor should take to minimize the impact on personnel (including reduction in work force notice of FAR 49.601-2(g)).
- (b) A default termination is a final decision that can be appealed. Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988).
  - (1) The termination notification must give notice to the contractor of right to appeal the default termination. Failure to properly advise the contractor of its appeal rights may prevent the "appeals clock" from starting if the contractor can show detrimental reliance. Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996).
  - (2) When mailed, the notice shall be sent by certified mail, return receipt requested. When hand delivered, a written acknowledgement shall be obtained from the contractor. FAR 49.102(a). A default termination notice is effective when delivered to the contractor. Fred Schwartz, ASBCA No. 20724, 76-1 BCA ¶ 11,916.

## **VII. RIGHTS AND LIABILITIES ARISING FROM TERMINATIONS FOR DEFAULT.**

- A. **Contractor Liability.** Upon termination of a contract, the contractor is liable to the government for any excess costs incurred in acquiring supplies or services similar to those terminated for default (see FAR 49.402-6) and for any other damages, whether or not repurchase is effected (see FAR 49.402-7). FAR 49.402-2(e).
  - 1. **Excess Reprocurement Costs.**
    - a. Under fixed-price supply and service contracts, the government can acquire supplies or services similar to those terminated and the contractor will be liable for any excess costs of those supplies or services. FAR 49.402-6; FAR 52.249-8(b); Ed Grimes, GSBCA No. 7652, 89-1 BCA ¶ 21,528.

- b. The government must show that its assessment was proper by establishing the following:
- (1) The reprocured supplies or services are the same as or similar to those involved in the termination. International Foods Retort Co., ASBCA No. 34954, 92-2 BCA ¶ 24,994.
  - (2) The government actually incurred excess costs. Sequal, Inc., ASBCA No. 30838, 88-1 BCA ¶ 20,382; and
  - (3) The government acted reasonably to minimize the excess costs resulting from the default. Daubert Chem. Co., ASBCA No. 46752, 94-2 BCA ¶ 26,741 (government acted reasonably where it reprocured quickly, obtained seven bids, and awarded to lowest bidder).
- c. Mitigation of damages. The government has an affirmative duty to mitigate damages on repurchase. Ronald L. Collier, ASBCA No. 26972, 89-1 BCA ¶ 21,328; Kessler Chem., Inc., ASBCA No. 25293, 81-1 BCA ¶ 14,949.
- (1) If the repurchase is for a quantity of goods in excess of the quantity that was terminated for default, the contracting officer may not charge the defaulting contractor for excess costs beyond the undelivered quantity terminated for default. FAR 49.402-6(a).



- (2) If a repurchase is for a quantity not in excess of the quantity that was terminated, the government shall repurchase at as reasonable a price as practicable. FAR 49.402-6(b). The Contracting Officer may use any terms and acquisition method deemed appropriate for the repurchase. 52.249-8(b). See Al Bosgraaf Son's, ASBCA No. 45526, 94-2 BCA ¶ 26,913 (reprocurement by modification of another contract inadequate to mitigate costs); International Technology Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102 (government may award a repurchase contract to the next-low offeror on the original solicitation when there is a short time span between the original competition and default).
    - (3) The Comptroller General has held that the government is not required to invite bids on repurchase solicitations from a defaulted contractor. Montage Inc., B-277923.2, Dec. 29, 1997, 97-2 CPD ¶ 176.
  - d. When the repurchase is defective, the defaulting contractor may be relieved of liability for excess costs. Ross McDonald Contracting, GmbH, ASBCA No. 38154, 94-1 BCA ¶ 26,316 (government failed to mitigate damages when exercising option on repurchase contract); Astra Prods. Co. of Tampa, ASBCA No. 24474, 82-1 BCA ¶ 15,497.
2. Liquidated Damages. Liquidated damages serve as a contractually agreed upon substitute for actual damages caused by late delivery or late completion of work. The government may recover both liquidated damages and an assessment of excess costs (either for repurchase or for completion of the work) from a contractor upon terminating a contract for default. FAR 49.402-7.
- a. The common law rule that liquidated damages will not be enforced if they constitute a penalty applies to government acquisitions. Southwest Eng'g Co. v. United States, 341 F.2d 998 (8th Cir. 1965).

- b. A liquidated damages clause will be enforced as reasonable where, at the inception of the contract, the damages are based on a reasonable forecast of possible damages in the event of failure of performance. American Constr. Co., ENG BCA No. 5728, 91-2 BCA ¶ 24,009.
  - c. If a contract does not have a liquidated damages clause or if the liquidated damages provision of a contract is unenforceable because it is punitive, the government may recover actual damages to the extent that they are proved. FAR 52.249-10.
- 3. Common law damages.
  - a. The government may also recover common law damages, which may be in lieu of or in addition to excess costs assessed under the default termination clause. FAR 52.249-8(h); Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985) (government awarded common law damages after failing to prove excess procurement costs); Hideca Trading, Inc., ASBCA No. 24161, 87-3 BCA ¶ 20,040 (despite failure to reprocore, government entitled to damages at the difference between the contract price and the market price for oil for the period 60 to 90 days after the default termination).
  - b. The government has the burden of proving that the damages are foreseeable, direct, material, or the proximate result of the contractor's breach of contract. ERG Consultants, Inc., VABCA No. 3223, 92-2 BCA ¶ 24,905 (damages must be foreseeable); Gibson Forestry, AGBCA No. 87-325-1, 91-2 BCA ¶ 23,874.
- 4. Unliquidated advance and progress payments. The government is entitled to repayment by the contractor of advance and progress payments, if any, attributable to the undelivered work. Smith Aircraft Co., ASBCA No. 39316, 90-1 BCA ¶ 22,475.

**B. The Government's Liabilities.**

1. Upon termination of a fixed-price supply contract for default, the government is liable only for the contract price for completed supplies delivered and accepted. FAR 52.249-8(f).
2. Upon termination of a fixed-price service contract or of a fixed-price construction contract, the government is liable only for the reasonable value of work done before termination, whether or not the services or construction have been contractually accepted by the government. Sphinx Int'l, Inc., ASBCA No. 38784, 90-3 BCA ¶ 22,952.
3. The government may also require the contractor to transfer title and deliver to the government its manufacturing materials, for which the government will pay the reasonable value. FAR 52.249-8(e); FAR 52.249-10(a).
4. Upon termination for default of a cost-reimbursement contract, the government is generally liable for all of the reasonable, allowable, and allocable costs incurred by the contractor, whether or not accepted by the government, plus a percentage of the contract fee. The fee is somewhat limited, however, as the amount of the contract fee payable to the contractor is based on the work accepted by the government, rather than on the amount of work done by the contractor. FAR 52.249-6.

**VIII. TERMINATION OF COMMERCIAL ITEM CONTRACTS.**

- A. Background. The Federal Acquisition Streamlining Act, P.L. 103-355, 108 Stat. 3243 (Oct. 13, 1994), established special requirements for the acquisition of commercial items. Congress intended government acquisitions to more closely resemble those customarily used in the commercial market place. FAR 12.201.

- B. **Applicable Rules for Terminations for Cause.** The clause at FAR 52.212-4 permits the government to terminate a contract for a commercial item for cause. This clause contains concepts that are in some ways different from "traditional" termination rules contained in FAR Part 49. Consequently, the requirements of FAR Part 49 do not apply when terminating contracts for commercial items. Contracting officers, however, may continue to follow Part 49 as guidance to the extent that Part 49 does not conflict with FAR 12.403 and FAR 52.212-4.
- C. **Policy.** The contracting officer should exercise the government's right to terminate a contract for a commercial item only when such a termination would be in the best interests of the government. Further, the contracting officer should consult counsel prior to terminating for cause. FAR 12.403(b).
- D. **Termination for Cause Highlights.** FAR 12.403; FAR 52.212-4.
1. **Grounds.** Under the rules, a contractor may be terminated for cause "in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms or conditions, or fails to provide the government, upon request, with adequate assurances of future performance." FAR 52.212-4(m).
  2. **Excusable Delay.** Contractors are required to notify contracting officers as soon as reasonably possible after the commencement of excusable delay. FAR 52.212-4(f). In most situations, this requirement should eliminate the need for a show cause notice prior to terminating a contract. FAR 12.403(c).
  3. **Rights and Remedies.** The government's rights and remedies after a termination for cause shall include all the remedies available to any buyer in the commercial market place. The government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess repurchase costs together with any incidental or consequential damages incurred because of the termination. FAR 12.403(c)(2).

## **IX. MISCELLANEOUS.**

- A. **Portion of the Contract That May Be Terminated for Default.**

1. Total or partial termination. A default termination may be total or partial. FAR 52.249-8(a)(1); Balimoy Mfg. Co. of Venice v. United States, 2000 U.S. App. LEXIS 26702 (Fed. Cir 2000).
  2. Severable contract requirements. Where a contract includes severable undertakings, default on one effort may not justify termination of the entire contract. T.C. Sarah C. Bell, ENG BCA No. 5872, 92-3 BCA ¶ 25,076.
- B. Availability of Funds. Funds that have been obligated but have not been disbursed at the time of termination for default and funds recovered as excess costs on a defaulted contract remain available for a replacement contract awarded in a subsequent fiscal year. Funding of Replacement Contracts, B-198074, July 15, 1981, 81-2 CPD ¶ 33; Bureau of Prisons-Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, Sep. 28, 1983, 84-1 CPD ¶ 91.
- C. Conversion to T4C. All FAR default clauses provide that an erroneous default termination will be converted to a termination for convenience. FAR 52.249-8(g); FAR 52.249-10(c); FAR 52.249-6(b). But see Apex Int'l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842 (board refuses to limit recovery to termination for convenience costs where government officials acted in bad faith; contractor entitled to breach damages).
- D. T4C Proposals while T4D appeal is pending.
1. A contractor, prior to the default being overturned, can submit a termination for convenience settlement proposal to the contracting officer. The proposals will be treated as Contract Disputes Act claims.<sup>2</sup> McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 285 (1997); Balimoy Mfg. Co. of Venice, ASBCA No. 49,730, 96-2 BCA ¶ 28,605.
  2. An appeal of a convenience settlement proposal will be dismissed without prejudice to reinstatement if the appeal of a default termination is pending. Poly Design, Inc., ASBCA No. 50862, 98-1 BCA ¶ 29,458.

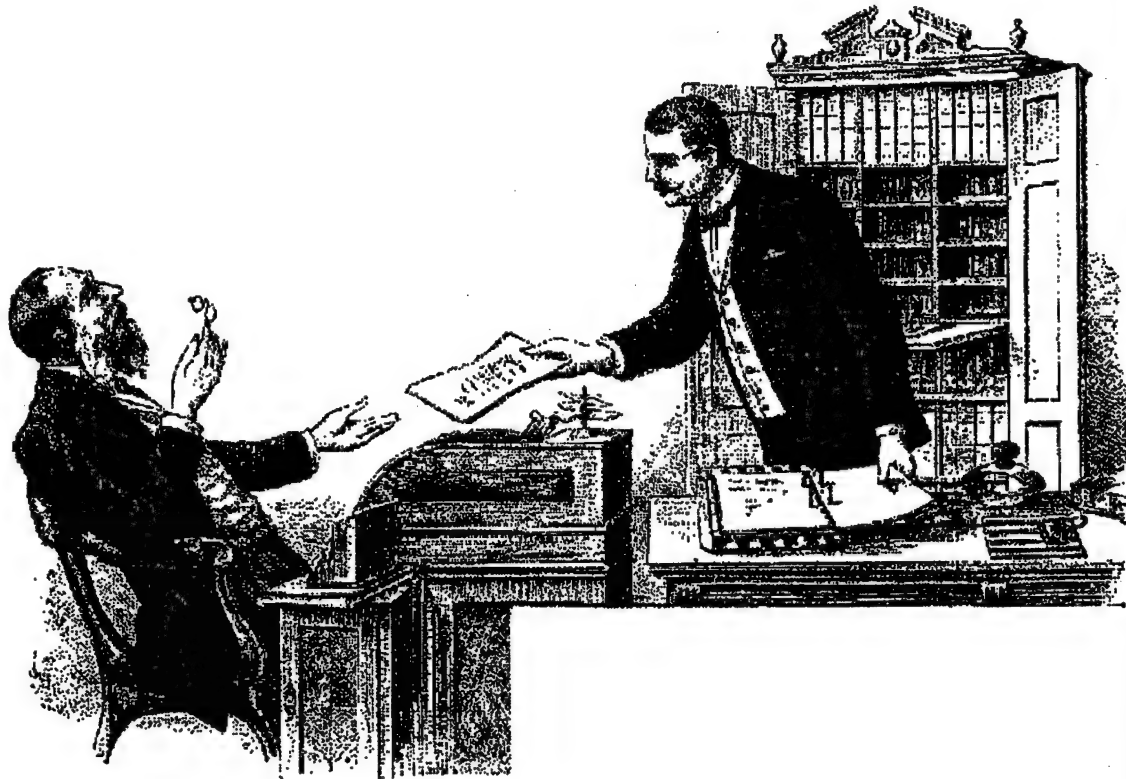
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<sup>2</sup> The demand for termination for convenience costs from the contracting officer who terminated the contract for default demonstrates the "impasse" required to convert a proposal into a claim.

**X. CONCLUSION.**

# *Chapter 24*

## **Competitive Sourcing**



*146th Contract Attorneys Course*

## CHAPTER 24

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## CHAPTER 24

### COMPETITIVE SOURCING<sup>1</sup>

*In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic growth. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.<sup>2</sup>*

**I. INTRODUCTION.** Objectives: Following this block of instruction, students will understand:

- A. The policies and procedures applicable to competitive sourcing.
- B. The policies and procedures applicable to the inventorying of federal positions.
- C. The policies and procedures applicable to military housing and utility privatization.

**II. COMPETITIVE SOURCING: BACKGROUND.**

- A. Origins.
  - 1. 1955: The Bureau of Budget issued a bulletin establishing the federal policy to obtain goods and services from the private sector.

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<sup>1</sup> "Competitive sourcing" is the latest term for "outsourcing" and "contracting out."

<sup>2</sup> FEDERAL OFFICE OF MANAGEMENT AND BUDGET CIRCULAR [OMB] A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, ¶ 4.a (Aug. 4, 1983) [hereinafter OMB Cir. A-76].

2. 1966: The Office of Management and Budget (OMB) issued OMB Cir. A-76, which restated this policy but justified using outsourcing for cost-savings. OMB revised the Circular again in 1967, 1979, 1983, and 1999.
3. 1996: The OMB issued a Revised Supplemental Handbook containing new guidance for OMB Cir. A-76. The OMB updated the Revised Supplemental Handbook in June 1999.

B. Past Legislative Roadblocks.

1. National Defense Authorization Act for FY 1988-89 allowed installation commanders to decide whether to study commercial activities for outsourcing. Codified at 10 U.S.C. § 2468(a), this law expired on 30 September 1995. Most commanders opted not to pursue outsourcing for the following reasons:
  - a. Disruptions to the workforce.
  - b. Cost of conducting the outsourcing studies.
  - c. Loss of control over workforce.
2. Other Roadblocks.
  - a. Department of Defense Appropriations Act for FY 1991 and subsequent DOD appropriations acts prohibited funding OMB Cir. A-76 studies.
  - b. National Defense Authorization Acts for FY 1993 and FY 1994 prohibited DOD from entering into contracts stemming from cost studies done under OMB Cir. A-76.

C. New Direction for OMB Cir. A-76.

1. 1993: National Performance Review: Reinvent government.

2. 1996: Defense Science Board Task Force on Outsourcing and Privatization: DOD could save 20-40 percent by outsourcing support activities.
3. 1997: Quadrennial Defense Review (QDR): Maintain combat readiness means cutting support functions.
4. 1997: Defense Reform Initiative (DRI): Expanded upon the QDR to propose more streamlining and outsourcing.

### III. COMPETITIVE SOURCING GENERALLY.

- A. Defined. Competitive Sourcing is the analysis and if appropriate, the transfer of a function previously performed "in-house" by government employees to an private entity, or vice-versa.
- B. Policy. See OMB Cir. A-76, para 5. It is the policy of the U.S. Government to:
  1. Rely on the commercial sector to provide commercial products and services.
  2. Retain inherently governmental functions in-house.
  3. Achieve economy and enhance productivity through the use of cost comparisons.
- C. Authority and Tools. OMB Cir. A-76; OMB Cir. A-76 Revised Supplemental Handbook (Mar. 1996; Revised 1999).
  1. OMB Cir. A-76 embraces the idea of using the commercial sector to provide certain supplies and services for the government if more economical. OMB Cir. A-76, para. 4.a.

- a. In its simplest terms, OMB Cir. A-76 is a process for agencies to use to determine if it is cheaper for either the government or the private sector to provide supplies or services.
  - b. In this process, both the government private sector offerors prepare proposals and submit estimates for the product or service.
2. The Revised Supplemental Handbook to OMB Cir. A-76 attempts to do the following:
  - a. Balance the interests of the parties involved,
  - b. Provide a level playing field between public and private sector offerors,
  - c. Seek the most cost effective means of obtaining commercial products and support services that are needed on a recurring basis, and
  - d. Provide new administrative flexibility in the government's make or buy decision process.
3. Scope. The policies and procedures of OMB Cir. A-76 and the Revised Supplemental Handbook apply to all federal executive agencies unless otherwise excluded by law. However, OMB Cir. A-76 and the Revised Supplemental Handbook do not:
  - a. Provide authority to enter into contracts.
  - b. Authorize contracts that create an employer-employee relationship between the government and the contractor employees.
  - c. Justify conversion to contract solely to avoid personnel ceilings or salary limitations.

D. Key Definitions. The heart and soul of competitive sourcing rests on whether an activity is commercial or inherently governmental.

1. Commercial Activity. A commercial activity is one which is operated by a federal agency and which provides a product or service that is or could be obtained from a private sector source. OMB Cir. A-76, para. 6.a; Revised Supplemental Handbook, Appendix 1. Some examples include the following: automatic data processing; audiovisual products and services; food services; maintenance services; transportation services. OMB Cir. A-76, Attachment A; Revised Supplemental Handbook, Appendix 2.<sup>3</sup>
2. Inherently Governmental Function. An inherently governmental function is one so intimately related to the public interest as to mandate performance by government employees. OMB Cir. A-76, para. 6.e; Revised Supplemental Handbook, Appendix 1; OFPP Policy Letter 92-1, Inherently Governmental Functions, 57 Fed. Reg. 45,101. Inherently governmental functions fall into two broad categories:
  - a. The act of governing via the discretionary exercise of government authority. Examples include criminal investigations, prosecutorial and judicial functions, managing and directing the armed forces, and combat, combat support, and combat service support roles.<sup>4</sup>
  - b. Monetary transactions and entitlements. Examples include tax collection and revenue disbursements, control of treasury accounts and money supply, and administering public trusts.

E. Exemptions. OMB Cir. A-76, para 7.c. The following activities are exempt from OMB Cir. A-76 and the Revised Supplemental Handbook:

1. Inherently governmental functions.

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<sup>3</sup> The OMB list is not exhaustive. The OMB cautions agencies to use its suggested list of commercial activities only as a guide.

<sup>4</sup> For a complete list of inherently governmental functions, *see* OMB Cir. A-76, para. 6.e(1). *See also* OFPP Policy Letter 92-1, *Inherently Governmental Functions*, Appendix A. For example, other inherently governmental functions include conducting foreign policy, determining agency policy, approving contract documents, determining contract costs, awarding contracts, and budget decision. OFPP Policy Letter 92-1 also contains a list of services and actions not considered inherently governmental. *Id.* at Appendix B.

2. DOD in times of declared war or military mobilization.
  3. The conduct of research and development.
- F. Exceptions. OMB Cir. A-76 and the Revised Supplemental Handbook permit exceptions to the general policy of relying on the private sector. These exceptions include the following:
1. No Satisfactory Commercial Source Available. OMB Cir. A-76, para. 8.a; Revised Supplemental Handbook, Part I, Chapter 1, para. C.5; FAR 7.303; AR 5-20, para. 2-3, 4-29b; AFI 38-203, para. 1.1.
  2. National Defense. National defense interests may justify performing the activity in-house. OMB Cir. A-76, para. 8.b; Revised Supplemental Handbook, Part I, Chapter 1, para. C.1. This exception includes selected military training in military skills, deployable activities, and rotation base.
  3. Patient Care. Patient care performed at a government-operated hospital can be retained in-house, if an agency determines that in-house performance would be in the best interest of direct patient care. OMB Cir. A-76, para. 8.c; Revised Supplemental Handbook, Part I, Chapter 1, para. C.2.
  4. Cost Comparison. When a cost comparison demonstrates that in-house performance would be cheaper than contractor performance, the government may retain an activity in-house. OMB Cir. A-76, para. 8.d; Revised Supplemental Handbook, Part I, Chapter 1, para. C.8.
  5. Core Capabilities. The agency must maintain a minimum core capability of specialized employees to ensure that it can fulfill its mission responsibilities and emergency requirements. Revised Supplemental Handbook, Part I, Chapter 1, para. C.3.
- G. DOD Commercial Activities Program: The implementation of OMB Cir. A-76.
1. Authority and Tools: OMB Cir. A-76; Revised Supplemental Handbook; DODD 4100.15; AR 5-20; AFD 38-6; AFI 38-203, para 1.1.



2. Policy. DODD 4100.15, para D. When implementing a commercial activities program, DOD components must consider the following policy guidance:
  - a. Ensure DOD mission accomplishment.
  - b. Achieve economy and quality through competition.
  - c. Retain governmental functions in-house.
  - d. Rely on the commercial sector, except when required for national defense, no satisfactory source is available, or when in the best interests of patient care.
  - e. Delegate decision authority and responsibility to lower organizational levels to give commanders freedom to "intelligently use their resources" while preserving essential wartime capability.
  - f. Provide placement assistance for displaced federal employees.

#### IV. THE A-76 STUDY PROCESS.

- A. Generally. The A-76 study process sets forth whether—and if so, how—to perform a cost comparison study for a commercial activity. The A-76 study process falls into the following broad areas:
  1. Conducting the inventory and review (figuring out what we have).
  2. Identifying the players (the team).
  3. Preparing the plans.
  4. Seeking offers.
  5. Choosing a winner.

6. Understanding the post-award review options.
7. Final Decision and implementation.

B. Conducting the Inventory and Review.

1. The Inventory Requirement. 10 U.S.C. § 2468(b); DOD Instr. 4100.33, para. 9. An inventory is a listing of all in-house and contracted commercial activities on an installation. Each agency evaluates all its activities and functions to determine which are inherently government functions and which are commercial activities.
2. The Review Requirement. DOD Instr. 4100.33, para. 9.
  - a. The agency must review its existing in-house commercial activities to determine whether it should convert them from in-house to contract status. This involves a two-step approach:
    - (1) The agency must first determine whether the activity must remain in-house for reasons other than lower cost, such as no commercial source available, patient care, etc.
    - (2) If the agency determines that a commercial activity does not fit one of the categories above, then it may face the requirement of a cost comparison study.
  - b. Direct Conversions. Activities with 10 or fewer full time equivalent employees may be converted without cost comparison, if the contracting officer determines that fair and reasonable prices cannot otherwise be obtained. Revised Supplemental Handbook, Part I, Chapter 1, para. C.6. The annual Defense Appropriations Act generally prohibits conversions involving more than 10 DOD civilian employees. See Section 8014 of the FY 2000 Defense Appropriations Act, Pub. L. No. 106-76, 113 Stat. 1212, 1234.

- c. Streamlined Cost Comparisons. Activities with 65 or fewer full time equivalent employees may use the simplified cost comparison procedures, if it will serve the equity and fairness purposes of OMB Cir. A-76. Revised Supplemental Handbook, Part II, Chapter 5. See RTS Travel Serv., B-283055, Sept. 23, 1999, 99-2 CPD ¶ 55 (holding that there is no requirement for a management plan or MEO as part of streamlined cost comparisons).

C. Identifying the Players.

1. Congress. The installation must notify DOD, through channels, of its intent to conduct a cost comparison if 50 or more persons perform the function proposed for OMB Cir. A-76 study. DOD in turn, must notify Congress. 10 U.S.C. § 2461(a).
2. Cost Comparison Study Team. A group of functional experts in the agency who prepare several plans (discussed in paragraph H.4, infra) and develop the agency's cost estimate, known as the Most Efficient Organization (MEO).
3. Unions. At least monthly, the installation must keep affected DOD employees notified of developments. 10 U.S.C. § 2467(b).

D. Preparing the Plans.

1. Performance Work Statement (PWS). The PWS serves as the heart of the possible future solicitation. DOD Instr. 4100.33, para. 15(d)(2). The PWS defines the agency's needs, the performance standards and measures, and the timeframe for performance. The PWS is a budget driven document. DOD Instr. 4100.33, para. 17B; Revised Supplemental Handbook, Part I, Chapter 1, para. I.
2. Quality Assurance Surveillance Plan (QASP). The QASP outlines how federal employees will inspect either the in-house or the contractor performance. Revised Supplemental Handbook, Part I, Chapter 3, para. D.

3. Management Plan. The management plan defines the overall structure for the MEO. This organizational structure serves as the government's proposed work force for cost comparison purposes. Revised Supplemental Handbook, Part I, Chapter 3, para. E; DOD Instr. 4100.33, para. 15(d)(3).
4. Most Efficient Organization (MEO). The MEO describes the way the government will perform the commercial activity and at what cost.

E. Seeking Offers.

1. Procurement Method. The Revised Supplemental Handbook permits all competitive methods under the FAR. Revised Supplement Handbook, Part I, Chapter 3, para. H.1.
  - a. Sealed bidding.
  - b. Two-Step.
  - c. Negotiated procurements.
2. Issue the solicitation. The agency issues the solicitation to seek offers from the private sector.
3. Negotiated Procurement. Special rules apply if the agency chooses negotiated procurements. Revised Supplemental Handbook, Part I, Chapter 3, para. H.3.
  - a. Source Selection Authority (SSA). The Source Selection Authority reviews contract offers and identifies the offer that represents the "best value" to the government. See NWT, Inc; PharmChem Laboratories, Inc., B-280988; B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158. The contracting officer then submits to the Source Selection Authority the government's in-house offer (not the cost estimate) to ensure that it meets the same level of performance and performance quality as the private offer. Revised Supplemental Handbook, Part I, Chapter 3, paras. H.3.c-d.

- b. Independent Review. Once the government makes any and all the changes necessary to meet the performance standards set by the SSA, the government submits a revised cost estimate to the Independent Review Officer. This review assures that the government's in-house cost estimate is based upon the same scope of work and performance levels as the best value contract offer. Revised Supplemental Handbook, Part I, Chapter 3, para. H.3.e.

F. Choosing the Winner.

- 1. The private offeror "wins" the OMB Cir. A-76 study if it beats the in-house or MEO estimate by a minimum cost differential of the lesser of
  - a. 10 percent of personnel costs, or
  - b. \$10 million over the performance period. The minimum differential ensures that the government will not convert for marginal cost savings. Revised Supplemental Handbook, Part I, Chapter 4, para. A.1.
- 2. Otherwise, the MEO "wins" and the installation keeps the commercial activity in-house.

G. Post-Award Review.

- 1. The Agency Appeal Process. FAR 7.307; DOD Instr. 4100.33, para. 18; Revised Supplemental Handbook, Part I, Chapter 3, para. K.
  - a. OMB Cir. A-76 requires agencies to develop an internal appeal process to challenge cost comparison decisions.

- (1) The agency must receive appeal within 20 calendar days of announcement of tentative decision. Revised Supplemental Handbook, Part I, Chapter 3, para. K.1.b. But see Apex Int'l Management Servs., Inc., B-228885.2, Jan. 6, 1988, 88-1 CPD ¶ 9 (finding low bidder not bound by agency time limits when rebutting challenge to its standing to receive award); FAR 52.207-2 (providing for a public review period of 15-30 working days, depending upon the complexity of the matter);
  - (2) The appeal must be based on noncompliance with the requirements and procedures of OMB Circular A-76 or specific line items on Cost Comparison Form; and
  - (3) The appeal must demonstrate that information has been wrongly withheld or the result of appeal would change cost comparison decision. Revised Supplemental Handbook, Part I, Chapter 3, para. K.1.
- b. Only "interested parties" may submit agency appeals. This encompasses directly affected parties: federal employees and their representative organizations; bidders; and offerors. Revised Supplemental Handbook, Part I, Chapter 3, para. K.2.
  - c. Decision on Appeal. The agency should provide for a decision within 30 days after the Appeal Authority received the appeal. Revised Supplemental Handbook, Part I, Chapter 3, para. K.8.
2. Protests to the General Accounting Office (GAO). The GAO's normal bid protest procedures apply to competitive sourcing protests.
    - a. Standing.

- (1) Only an "interested party" as defined by the Competition in Contracting Act (CICA) may file a protest with the GAO: "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551 (2). See American Overseas Marine Corp.; Sea Mobility, Inc., B-227965.2, B-227965.4, Aug. 20, 1987, 87-2 CPD ¶ 190 (holding protester not in line for award, so protest dismissed).
- (2) Unlike the agency appeal process, "interested party" does not encompass affected employees or their labor unions. See Part V.B.2., infra.

b. Timing.

- (1) The protester must exhaust the agency appeal process. See Omni Corp., B-2281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (dismissing as premature a protest filed with the GAO when protester challenged cost study before post-award debriefing at the end of the agency appeal process); Professional Servs. Unified, Inc., B-257360.2, July 21, 1994, 94-2 CPD ¶ 39 (dismissing cost comparison protest as premature).
- (2) The protester must file the protest within 10 working days of agency decision. See Base Services, Inc., B-235422, Aug. 30, 1989, 89-2 CPD ¶ 192 (finding a protest filed during the 15-day review period mandated by FAR 7-307 was timely); Northrop Worldwide Aircraft Servs., Inc., B-212257.2, Dec. 7, 1983, 83-2 CPD ¶ 655 (finding appeal filed 10 working days after agency decision); Space Age Eng'g, Inc., B-230148, February 19, 1988, 88-1 CPD ¶ 173 (finding irrelevant if the protester requests reconsideration by agency). Note: New bid protest rules have reduced the time for filing a protest to 10 calendar days.

c. Standard of Review. When reviewing cost comparison decisions, the GAO applies the following standard of review:

- (1) To determine “whether the comparison was conducted reasonably”;
- (2) To determine if the agency complied with applicable procedures; and
- (3) If the agency failed to follow procedures, to determine if the failure could have materially affected the outcome of the cost comparison.

d. Trends. From the GAO cases decided since late 1998, several trends have emerged in A-76 study process protests.

- (1) The A-76 process is a contracting process and the GAO will treat it as such. See, e.g., NWT, Inc., PharmChem Laboratories, Inc., B-282988, B-280988.2, Dec 17, 1998, 98-2 CPD ¶ 158 (holding that agencies could apply best value to cost comparison studies); Omni Corp., B-281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (applying agency debriefing requirement to cost comparison studies).
- (2) As a contracting process, the cost study procedures must be fair. See, e.g., Rice Servs, Ltd., B-284997, June 29, 2000, 2000 U.S. Comp. Gen. LEXIS 106 (finding that the Navy failed to evaluate fairly the contractor and government proposals); DZS/Baker LLC, Morrison Knudsen Corp., B-281224, et seq., Jan. 12, 1999, 99-1 CPD ¶ 19 (analyzing conflicts of interest in cost comparison studies).



- (3) Within reason, the GAO will accord agencies discretion in their cost studies. See RTS Travel Serv., B-283055, Sept. 23, 1999, 99-2 CPD ¶ 55 (holding agency did not err in adding contract administration costs to the contractor's proposal); Gemini Industries, Inc., B-281323, Jan. 25, 1999, 99-1 CPD ¶ 22 (holding agency acted properly when it evaluated proposals against the estimate of proposed staffing); Symvionics, Inc., B-281199.2, Mar. 4, 1999, 99-1 CPD ¶ 48 (finding the agency conducted a fair cost comparison despite not sealing the management plan and MEO); Bay Tankers, Inc., B-230794, July 7, 1988, 88-2 CPD ¶ 18 (holding that the GAO will not look at MEO staffing pattern absent fraud or bad faith).
- (4) The General Accounting Office will not review the agency's decision not to issue a solicitation for cost comparison purposes. Inter-Con Security Sys., Inc., B-257360.3, Nov. 15, 1994, 94-2 CPD ¶ 187.

3. Court Challenges.

- a. Jurisdiction. The Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320 (codified at 28 U.S.C. § 1491(b)(1)), provide the U.S. Court of Federal Claims (COFC) and the district courts of the United States with concurrent jurisdiction to hear pre-award and post-award bid protests. Specifically, each court independent of the other has jurisdiction to hear protests that object to a solicitation, proposed award, or alleged violation of statute. 28 U.S.C. § 1491(b)(1).
- b. Standing.
  - (1) Only an "interested party" under the ADRA has standing to challenge procurement decisions, though the term is not limited to just those parties covered by CICA. See e.g., Phoenix Air Group, Inc. v. United States, 46 Fed. Cl. 90 (2000); Winstar Communications, Inc. v. United States, 41 Fed. Cl. 748 (1998); CCL, Inc. v. United States, 39 Fed. Cl. 780 (1997).

- (2) Historically, employees and labor unions have had little success in federal court challenging the decision to outsource commercial activities. See Part V.B.3., infra.

#### H. Final Decision and Implementation.

1. Once the appeal period has expired, then the Decision Summary is sent to the agency for approval by the Secretary of Defense and notice to Congress. 10 U.S.C. § 2461(a).
2. The approval is either for award to the contractor or retention in house.
3. If the MEO wins the cost study, then it will be implemented upon the commander's approval.
4. Contractor Implementation.
  - a. Reviews. Contracted commercial activities will be continually monitored to ensure that performance is satisfactory and cost effective.
  - b. If contractor defaults during the first year:
    - (1) Award to the next offeror in line at an adjusted price for the remainder of the contract term.
    - (2) If the MEO is the next low, implement the MEO if feasible.
    - (3) If contract cannot be performed by the next offeror or MEO (as above), issue a new solicitation without a cost comparison study, reprocure from an original contractor offering a reasonable price, or initiate a transfer cost comparison to bring the activity back in house. Revised Supplemental Handbook, Part I, Chapter 3, para. L.7.

- (4) If the contractor defaults after the first year, seek interim contract support and solicit a new contractor, reprocure from a contractor offering a reasonable price, or initiate a transfer cost comparison to bring the activity back in house.

5. MEO Implementation: Post-MEO Performance Reviews.

- a. When services are performed in-house following a cost comparison, a post-MEO performance review will be conducted at the end of the first full year of performance. If the MEO has not been implemented and deficiencies are not corrected, re-award to the next offeror if feasible, or initiate a new cost competition study. Revised Supplemental Handbook, Part I, Chapter 3, para. L.1.
- b. The organization, position structure, and staffing of the implemented MEO will not normally be altered within the first year. If changes in functions or workloads occur, the performance work statement (PWS) should be modified and such modification should be fully documented.
- c. Reviews will be conducted on at least 20 percent of the in-house functions after a full year of performance. Revised Supplemental Handbook, Part I, Chapter 3, para. L.3.

V. CIVILIAN PERSONNEL ISSUES.

A. Civilian Personnel Management.

1. The servicing Civilian Personnel Office must coordinate with management officials, employees, and union officials to minimize personnel turbulence and adverse effects on employees. AR 5-20, para. 3-1; AFCAPI, para. 8.4.4.
2. Commanders must ensure that the Civilian Personnel Office is brought into the planning, review, and conduct of cost comparison studies from the beginning. AR 5-20, para. 3-1; AFCAPI, para. 8.4.1.

3. As noted earlier, the installation must notify DOD, through channels, of its intent to conduct a cost comparison if 50 or more persons (civilians) perform the function proposed for OMB Cir. A-76 study. DOD, in turn, must notify Congress. 10 U.S.C. § 2461(a).
4. At least monthly during the conduct of a cost competition or direct conversion study, commanders shall consult with civilian employees who will be affected by the study and consider their views on the development and preparation of the performance work statement and the management study. 10 U.S.C. § 2467.
  - a. At the earliest possible stages, affected parties will have the opportunity to participate in the development of documents and proposals, including the performance standards, performance work statement, management plans and the development of in-house cost estimates. Revised Supplemental Handbook, Part I, Chapter 1, para. G.
  - b. Upon issuance, a solicitation used in a cost comparison will be made available to directly affected employees and their representatives for comment. They will be given sufficient time to review the document and submit comments before final receipt of offers from the private sector. Revised Supplemental Handbook, Part I, Chapter 1, para. G.
5. Reduction-in-Force Planning. The Civilian Personnel Office must provide sufficient lead-time to issue Reduction-in-Force (RIF) notices to ensure a timely transition for the cost comparison decision. Every reasonable effort will be made to place or retrain displaced civilian employees. If no vacancies exist or are projected, coordinate with state employment offices for retraining opportunities under the Job Training Partnership Act. Commanders should make every effort to help separated employees find continuing employment elsewhere, especially through the right of first refusal. See generally AR 5-20, para. 3-4; AFCAPI, para. 8.4.4.1.1.

B. Federal Employee/Union Remedies.

1. Agency Appeals. Federal employees and their representative organizations are interested parties for purposes of agency appeals of cost comparison commercial activity studies. Revised Supplemental Handbook, Part I, Chapter 3, para. K.2.
2. GAO Protests. Federal employees, as well as labor unions representing potentially displaced federal workers, do not have standing to challenge a procurement to contract out services that were previously performed by government employees, because they are not "actual or prospective bidders." American Fed'n of Gov't Employees, B-282904.2, 2000 U.S. Comp. Gen. LEXIS ¶ 83 (June 7, 2000); American Fed'n of Gov't Employees, B-223323, 86-1 CPD ¶ 572; American Fed'n of Gov't Employees, B-219590, B-219590.3, 86-1 CPD ¶ 436.
3. Court Challenges. Federal employees and labor unions have had limited success challenging an agency decision to outsource positions.
  - a. AFGE, AFL-CIO, AFGE, AFL-CIO, Local 1482 v. United States, 46 Fed. Cl. 586 (2000)(holding that federal employees and their unions lacked standing as they were not within the zone of interests protected by the statutes that they alleged were violated).
  - b. AFGE v. United States, 104 F. Supp. 2d 58 (D.C. Dist. Ct 2000) (holding that federal employees and their unions did have standing to challenge a direct conversion to preferentially-treated Native American firms pursuant to Section 8014 of the FY 2000 Defense Appropriations Act).
  - c. AFGE, Local 2119 v. Cohen, 171 F.3d 460 (7th Cir. 1999) (holding that displaced federal employees and their unions did not have standing under 10 U.S.C. § 2462 to challenges the Army's decision to award two contracts to private contractors, but had standing here under the Arsenal Act (10 U.S.C. § 2542)).
  - d. AFGE v. Clinton, 180 F.3d 727 (6th Cir. 1999) (holding that governmental employees and their labor union lacked standing to protest agency's decision to directly convert positions to contractor performance, as their injury was not concrete and particularized).

- e. National Air Traffic Controllers Ass'n v. Pena, 78 F.3d 585 (6th Cir. 1996)(not recommended for full-text publication)(holding that employees had standing to challenge the agency's determination that their positions were not inherently governmental functions).
- f. Diebold v. United States, 947 F.2d 787 (6th Cir. 1991) (holding that the government's decision to privatize an activity was subject to review under the Administrative Procedure Act (APA), but remanding the case to determine whether displaced federal employees and their union had standing to maintain the action).
- g. NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989) (holding that displaced federal workers and their unions do not have standing to challenge the A-76 cost comparison process).

- 4. Grievances. OMB Cir. A-76 is a government-wide regulation and the agency is not required to bargain over appropriate arrangements. Department of Treasury, IRS v. Federal Labor Relations Authority, 996 F.2d 1246, 1252 (D.C. Cir. 1993). See also Department of Treasury, IRS v. Federal Labor Relations Authority, 110 S.Ct. 1623 (1990); AFGE Local 1345 and Department of the Army, Fort Carson, 48 FLRA 168 (holding that proposal requiring an additional cost study to consider cost savings achievable by alternate methods such as furloughs and attrition was not negotiable).

C. Right of First Refusal: Generally. FAR 52.207-3.

- 1. The clause reads as follows:

The Contractor shall give the Government employees who have been or will be adversely affected or separated as a result of award of this contract the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-Government employment conflict of interest standards. Within 10 days after contract award, the Contracting Officer will provide to the Contractor a list of all Government employees who have been or will be adversely affected or separated as a result of award of this contract.

2. The right of first refusal extends only to permanent employees. It does not extend to temporary employees. A union has associational standing to challenge the granting of this right. See National Maritime Union of America v. Commander, Military Sealift Command, 824 F.2d 1228 (1986). The contractor shall report to the Contracting Officer the names of individuals identified in the list who are hired within 90 days after contract performance begins. This report shall be forwarded within 120 days after contract performance begins.

D. Right of First Refusal: Relationship with Conflict of Interest Laws.

1. In most instances, federal employees will participate in preparing the PWS and the MEO. Certain conflict of interest statutes may impact when and if they may exercise their right of first refusal.
2. Procurement Integrity Act, 41 U.S.C. § 423; FAR 3.104.
  - a. Disclosing or Obtaining Procurement Information (41 U.S.C. §§ 423(a)-(b)). These provisions apply to all federal employees, regardless of their role during an OMB Cir. A-76 study.
  - b. Reporting Employment Contacts (41 U.S.C. § 423(c)).
    - (1) FAR 3.104-3 generally excludes from the scope of "personally and substantially" the following employee duties during an OMB Cir. A-76 study:
      - (a) Management studies;
      - (b) Preparation of in-house cost-estimates;
      - (c) Preparation of the MEO; or
      - (d) Furnishing data or technical support others use to develop performance standards, statements of work, or specifications.

- (2) MEO role. Probably not required to report employment contacts.
  - (3) PWS role. Consider employee's role: technical only?
- c. Post-Employment Restrictions (41 U.S.C. § 423 (d)). Bans certain employees for one year from accepting compensation.
- (1) Applies to contracts exceeding \$10 million, and
    - (a) Employees in any of these positions:
      - (i) Procuring contracting officer;
      - (ii) Administrative Contracting Officer;
      - (iii) Source Selection Authority;
      - (iv) Source Selection Evaluation Board member;
      - (v) Chief of Financial or Technical team;
      - (vi) Program Manager; or
      - (vii) Deputy Program Manager.
    - (b) Employees making these decisions:
      - (i) Award contract or subcontract exceeding \$10 million;
      - (ii) Award modification of contract or subcontract exceeding \$10 million;



- (iii) Award task or delivery order exceeding \$10 million;
- (iv) Establish overhead rates on contract exceeding \$10 million;
- (v) Approve contract payments exceeding \$10 million; or
- (vi) Pay or settle a contract claim exceeding \$10 million.

- (2) No exception to one-year ban for offers of employment pursuant to right of first refusal. Thus, employee performing any of the listed duties or making the listed decisions on cost comparison resulting in a contract exceeding \$10 million is barred for one year after performing such duties from accepting compensation/employment opportunities from contract via the right of first refusal.

3. Financial Conflicts of Interest, 18 U.S.C. § 208. Prohibits officers and civilian employees from participating personally and substantially in a "particular matter" affecting the officer or employee's personal or imputed financial interests.<sup>5</sup>

- a. Cost comparisons conducted under OMB Cir. A-76 are "particular matters" under 18 U.S.C. § 208.
- b. Whether 18 U.S.C. § 208 applies to officers and civilian employees preparing a PWS or MEO depends on whether the participation will have a "direct and predictable" effect on their financial interests. This determination is very fact specific.

<sup>5</sup> In January 1999, the GAO sustained a cost comparison study protest because 14 of the 16 agency evaluators held positions subject to being contracted out. The GAO found an organizational conflict of interest under FAR subpart 9.5. DZS/Baker LLC; Morrison Knudsen Corp., B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19. OMB has now issued guidance stating that it is a "better business practice" to limit participation on source selection teams of those personnel whose jobs are involved in a cost comparison. Accordingly, "individuals who hold position in an A-76 study should not be members of the Source Selection Team, unless an exception is authorized by the head of the contracting activity."

4. Representational Ban, 18 U.S.C. § 207. Prohibits individuals who personally and substantially participated in, or were responsible for, a particular matter involving specific parties while employed by the government from switching sides and representing any party back to the government on the same matter. The restrictions in 18 U.S.C. § 207 do not prohibit employment; they only prohibit communications and appearances with the “intent to influence.”
  - a. The ban may be lifetime, for two years, or for one year, depending on the employee’s involvement in the matter.
  - b. Whether 18 U.S.C. § 207 applies to employees preparing a PWS or MEO depends on whether the cost comparison has progressed to the point where it involves “specific parties.”
  - c. Even if 18 U.S.C. § 207 does apply to these employees, it would not operate as a bar to the right of first refusal. The statute only prohibits representational activity; it does not bar behind-the-scenes advice.

**VI. FEDERAL ACTIVITIES INVENTORY REFORM ACT (FAIR ACT) OF 1998,”**  
Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).

- A. Generally. The FAIR Act addresses certain parts of the competitive sourcing process.
  1. Key features:
    - a. Codifies the definition of “inherently governmental function.” The “new” statutory definition mirrors the definition of inherently governmental function already found in OFPP Policy Letter 92-1, Inherently Governmental Function, para. 5.
    - b. Requires each executive agency to submit to OMB an annual list (by 30 June) of non-inherently governmental (commercial) activities) performed by federal (civilian) employees. After mutual consultation, both OMB and the agency will make the list public. The agency will also forward the list to Congress.

c. Provides "interested parties" the chance to challenge the list within 30 days after its publication. The "interested party" list includes a broad range of potential challengers:

(1) A private sector source that is:

- (a) an actual or prospective bidder for any contract (or other form of agreement) to perform the activity, and
  - (b) has a direct economic interest in performing the activity that would be adversely affected by a decision not to procure the activity from the private sector;
- (2) A representative of any business or professional group that includes those private sector sources in its membership;
- (3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity; and
- (4) The head of any labor organization referred to in 5 U.S.C. § 7103(a)(4) that includes within its membership those officers or employees.

d. Requires agencies to use a competitive process to select a private sector source, except as provided by law, regulation, or circular.

e. Requires agencies to conduct "realistic and fair" cost comparisons when deciding whether to contract with a private sector source.

B. OMB Guidance on the FAIR Legislation.

1. Congress directed the OMB to issue guidance to implement the FAIR. On 1 March 1999, the OMB issued draft guidance for public comment. The draft guidance is at 64 Fed. Reg. 10031 (March 1, 1999). After receiving public comments, the OMB issued its final guidance on 24 June 1999. 64 Fed. Reg. 33927 (June 24, 1999).
2. To implement the FAIR, the OMB changed both OMB Cir. A-76 and its Revised Supplemental Handbook. The key provisions of the OMB guidance are as follows:
  - a. *Revised Supplemental Handbook, Part I, Chapter 1, para. A:* The OMB Guidance added a reference to the FAIR Act in the first sentence. As revised, Part I of the Revised Supplemental Handbook states that it contains the “principles and procedures” for implementing the FAIR Act. A similar revision is found in OMB Cir. A-76, para. 1.
  - b. *Revised Supplemental Handbook, Part I, Chapter 1, para. B:* The OMB Guidance added a reference to the FAIR Act’s definition of inherently governmental function. As revised, the Revised Supplemental Handbook states that its definition of inherently governmental function conforms with the one in the FAIR Act. A similar revision is found in OMB Cir. A-76, para. 6.e.
  - c. *Revised Supplemental Handbook, Part II, Chapter 1, para. A.1:* The OMB guidance added a reference to the FAIR Act in the first sentence. As revised, the Revised Supplemental Handbook states that it contains the “generic and streamlined cost comparison guidance” to comply with the FAIR Act.
  - d. *Revised Supplemental Handbook, Appendix 2:* The OMB guidance changed the name from the OMB Circular No. A-76 Inventory” to the “Commercial Activities Inventory.” The OMB guidance further revised Appendix 2 as follows:

- (1) *Paragraph A*: The OMB Guidance added the FAIR Act's inventory requirement and 30 June due date. It also added two additional data elements to the agency's description of a commercial activity: the year the activity first appeared on the inventory under FAIR, and the agency point of contact responsible for the activity. A similar revision is found in OMB Cir. A-76, para. 10.
- (2) *Paragraph G (new)*: The OMB guidance added the FAIR Act's requirements to review and publish the inventories and the process "interested parties" can use to challenge the inventory. A similar revision is found in OMB Cir. A-76, paras. 6.h, 10.
- (3) *Paragraph H (new)*: The OMB guidance added the FAIR Act's requirements for agencies to review their inventories and use a competitive process, with a cost comparison procedure, when considering contracting with the private sector for the performance of an activity on the inventory.

C. The FAIR Lists.

1. Under the OMB guidance, agencies are required to list the "noninherently governmental activities," using "reason" and "function" codes.
  - a. The reason codes would show whether or not the agency believed that the commercial activity would be subject to a cost study, and would include those commercial activities that cannot be competed because of a legislative or other exemption.
  - b. The function code characterizes the type of activity that the agency performs.
2. The OMB has released the names of the agencies that have published their lists. See 64 Fed. Reg. 52,809 (1999) (providing notice of the first 52 agencies that have published their lists); 64 Fed. Reg. 58,641 (1999) (providing notice that NASA and the Department of Energy have published their lists); 64 Fed. Reg. 73,595 (1999) (providing notice that DOD published its list).

3. Several interested parties have challenged FAIR Act inventories from certain agencies, such as NASA, the Environmental Protection Agency, and the Department of Commerce.

D. Reactions to the FAIR Act Lists.

1. General Accounting Office. The GAO has released several reports assessing how agencies have implemented the FAIR Act.<sup>6</sup> The reports have noted the following issues and deficiencies:
  - a. The decisions agencies made about whether or not activities were eligible for competition and the reasons for those decisions.
  - b. The processes agencies used to develop their FAIR Act inventories.
  - c. The usefulness (or uselessness) of the FAIR Act inventories.
  - d. The need for additional information in future FAIR Act inventories.
2. Congressional Testimony. Several individuals testified before the House Committee on Government Reform on 28 October 1999 about the FAIR Act implementation. These comments may be summarized as follows:
  - a. The OMB guidance is inadequate and did not carry out the intent of Congress when it passed the FAIR Act.
  - b. The completed lists are difficult to access and the OMB should make them centrally available.

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<sup>6</sup> GENERAL ACCOUNTING OFFICE, COMPETITIVE CONTRACTING: AGENCIES UPHELD FEW CHALLENGES AND APPEALS UNDER THE FAIR ACT, REPORT NO. GAO/GGD/NSIAD-00-244 (Sept. 2000); GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: MORE CONSISTENCY NEEDED IN IDENTIFYING COMMERCIAL ACTIVITIES, REPORT NO. GAO/NSIAD-00-198 (Aug. 2000); GENERAL ACCOUNTING OFFICE, COMPETITIVE CONTRACTING: THE UNDERSTANDABILITY OF FAIR ACT INVENTORIES WAS LIMITED, REPORT NO. GAO/GGD-00-68 (Apr. 2000); GENERAL ACCOUNTING OFFICE, COMPETITIVE CONTRACTING: PRELIMINARY ISSUES REGARDING FAIR ACT IMPLEMENTATION, REPORT NO. GAO/T-GGD-00-34 (Oct. 28, 1999).

- c. Congress should impose a moratorium on outsourcing until a complete picture of the true size of the federal contracting workforce is available.

## VII. DOD COMPETITIVE SOURCING REPORTS/STUDIES.

- A. Actual Cost Savings. Early on in the recent competitive sourcing fray, the General Accounting Office reviewed the DOD's cost savings efforts with mixed results.<sup>7</sup> The General Accounting Office noted that DOD faced several challenges in conducting cost studies with the goal of saving significant dollars. Some of the challenges the General Accounting Office spotted included the following:
  - 1. Costs savings of 20-40 percent overstated for several reasons:
    - a. DOD derived the projected savings from limited database information; and
    - b. DOD has the potential to save money with large omnibus contracts, but these tools have their own constraints.
  - 2. Historical impediments to competitive sourcing, such as:
    - a. Lack of resources to conduct OMB Cir. A-76 studies as a result of downsizing and civilian personnel cuts.
    - b. Time limits for studies are short. The Revised Supplemental Handbook contains limits for cost comparison studies: 18 months for single activities, 36 months for multiple activities. DOD is also constrained by statutory time limits. See Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8026, 112 Stat. 2279, 2302 (1998).

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<sup>7</sup> See GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: SOME PROGRESS, BUT CONTINUING CHALLENGES REMAIN IN MEETING PROGRAM GOALS, REPORT NO. GAO/NSIAD-00-106 (Aug. 2000); GENERAL ACCOUNTING OFFICE, OUTSOURCING DOD LOGISTICS: SAVINGS ACHIEVABLE BUT DEFENSE SCIENCE BOARD PROJECTIONS ARE OVERSTATED, REPORT NO. GAO/NSIAD-98-48 (Dec. 8, 1997); GENERAL ACCOUNTING OFFICE, BASE OPERATIONS: CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING, REPORT NO. GAO/NSIAD-97-86 (Mar. 11, 1997).

- c. Legislative constraints on competitive sourcing, such as congressional notification of cost studies and annual reports to Congress. In addition, 10 U.S.C. § 2465 precludes outsourcing of firefighters and security guards, except under limited circumstances.
- B. DOD's Report Card. The General Accounting Office evaluated DOD's competitive sourcing efforts and assigned DOD a "report card" of sorts.<sup>8</sup> The General Accounting Office reviewed completed competitions between October 1995 and March 1998; reviewed the completion time, savings produced; and identified problems in implementing the results. Some of the key results the General Accounting Office focused on are as follows:
  - 1. Completed cost studies totaled 53, involving 5757 positions (3226 military and 2531 civilian). Of the 53 competitions, 43 involved single functions (such as grounds maintenance) and 10 involved multiple functions (such as base operating support contracts). Of the completed cost studies, 85 percent belonged to the Air Force. The private sector won 60 percent of the completed cost studies.
  - 2. DOD performed the cost studies generally within the established time frames. The average completion time was 18 months for single functions and 30 months for multiple functions.
  - 3. DOD's projected cost savings of \$528 million is subject to change over time.

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<sup>8</sup> GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: RESULTS OF RECENT COMPETITIONS, Report No. GAO/NSIAD-99-44 (Feb. 23, 1999). For a companion GAO report, see GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: QUESTIONS ABOUT GOALS, PACE, AND RISKS OF KEY REFORM INITIATIVE, Report No. GAO/NSIAD-99-46 (Feb. 22, 1999). The GAO has issued other recent reports. See GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: LESSONS LEARNED SYSTEM COULD ENHANCE A-76 STUDY PROCESS, GAO/NSIAD 99-152 (July 21, 1999); GENERAL ACCOUNTING OFFICE, A-76 NOT APPLICABLE TO AIR FORCE 38<sup>TH</sup> ENGINEERING INSTALLATION WING PLAN, Report No. GAO/NSIAD-99-73 (Feb. 26, 1999); GENERAL ACCOUNTING OFFICE, PUBLIC-PRIVATE PARTNERSHIPS: KEY ELEMENTS OF FEDERAL BUILDING AND FACILITY PARTNERSHIPS, Report No. GAO/GGD-99-23 (Feb. 3, 1999); GENERAL ACCOUNTING OFFICE, GOVERNMENT MANAGEMENT: OBSERVATIONS ON OMB'S MANAGEMENT LEADERSHIP EFFORTS, Report No. GAO/T-GGD/AIMD-99-65 (Feb. 4, 1999).



4. DOD has experienced few problems implementing the results of the cost studies. To date, however, many of the completed studies have been in effect for an average of 15 months or less. Thus, the General Accounting Office noted that it could not offer a meaningful assessment of performance.

C. Lessons Learned.

1. In 1999, the GAO also evaluated the DOD's competitive sourcing process for lessons learned.<sup>9</sup>
2. The report offered the following observations:
  - a. The DOD has improved its competitive sourcing studies, but needs to devote more time to identify and disseminate best practices DOD-wide.
  - b. The DOD has improved the quality of the performance-based work statements for the cost studies, but has limited efforts to develop standard.

## VIII. HOUSING PRIVATIZATION.

- A. Generally. Privatization involves the process of changing a federal government entity or enterprise to private or other non-federal control and ownership. Unlike competitive sourcing, privatization involves a transfer of ownership, control and responsibility, and not just a transfer of performance.
- B. Authority. 10 U.S.C. §§ 2871-85 provides temporary authority for military housing privatization. This legislation expires in 2001 (although the draft FY 2001 National Defense Authorization Act plans to extend such authority for an additional five years).
  1. This authority applies to family housing units on or near military installations within the United States and military unaccompanied housing units on or near installations within the United States.

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<sup>9</sup> GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: LESSONS LEARNED SYSTEM COULD ENHANCE A-76 STUDY PROCESS, REPORT NO. GAO/NSIAD 99-152 (July 21, 1999).

2. Secretary may use any authority or combination of authorities to provide for acquisition or construction by private persons. Authorities include:
  - a. Direct loans and loan guarantees to private entities.
  - b. Build/lease authority.
  - c. Equity and creditor investments in private entities undertaking projects for the acquisition or construction of housing units (up to a specified percentage of capital cost). Such investments require a collateral agreement to ensure that a suitable preference will be given to military members.
  - d. Rental guarantees.
  - e. Differential lease payments.
  - f. Conveyance or lease of existing properties and facilities to private entities.
3. Establishment of Department of Defense housing funds.
  - a. The Department of Defense Family Housing Improvement Fund.
  - b. The Department of Defense Military Unaccompanied Housing Improvement Fund.

C. Goals and Projects.

1. Goals. The DOD goals for the housing privatization process are twofold:
  - a. The stated goal is to eliminate all inadequate family housing by 2010.
  - b. The unstated goal is to get the services out of business of family housing ownership.

2. Current Army Housing Privatization Projects.

- a. Ft. Carson awarded a 50-year contract on September 30, 1999, for the privatization of 1,823 existing family housing units, and the construction of 840 new units.
- b. Ft. Hood awarded a 50-year contract on June 28, 2000, for the privatization of 5,482 existing family housing units, plus the construction of 1149 new units.
- c. Ft. Lewis awarded a 50-year contract on August 30, 2000, for the privatization of 3,589 existing family housing units, plus the construction of 759 new units.
- d. Ft. Meade (2,862 existing units, plus 308 new units): currently accepted proposals from contractors.
- e. The Army is proposing 16 additional family housing privatization projects from FY02 to FY05.

D. Implementation.

- 1. The service conveys ownership of existing housing units, and leases the land upon which they reside for up to 50 years.
- 2. The consideration received for the sale is the contractual agreement to renovate, manage, and maintain existing family housing units, as well as construct, manage, and maintain new units.
- 3. The contractual agreement may include provisions regarding:
  - a. The amount of rent the contractor may charge military occupants (rent control).
  - b. The manner in which soldiers will make payment (allotment).

- c. Rental deposits.
- d. Loan guarantees to the contractor in the event of a base closure or realignment.
- e. Whether soldiers are required to live there.
- f. The circumstances under which the contractor may lease units to nonmilitary occupants.

E. Issues and Concerns.<sup>10</sup>

- 1. Loss of control over family housing.
- 2. The affect of long-term agreements.
  - a. Future of installation as a potential candidate for housing privatization.
    - (1) DOD must determine if base a candidate for closure.
    - (2) If not, then DOD must predict its future mission, military population, future housing availability and prices in the local community, and housing needs.
  - b. Potential for poor performance or nonperformance by contractors.
    - (1) Concerns about whether contractors will perform repairs, maintenance, and improvements in accordance with agreements. Despite safeguards in agreements, enforcing the agreements might be difficult, time-consuming, and costly.

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<sup>10</sup> See GENERAL ACCOUNTING OFFICE, MILITARY HOUSING: CONTINUED CONCERNS IN IMPLEMENTING THE PRIVATIZATION INITIATIVE, Report No. GAO/NSIAD-00-71 (March 30, 2000); GENERAL ACCOUNTING OFFICE, MILITARY HOUSING: PRIVATIZATION OFF TO A SLOW START AND CONTINUED MANAGEMENT ATTENTION NEEDED, Report No. GAO/NSIAD-98-178 (July 17, 1998).

- (2) Potential for a decline in the value of property towards the end of the lease might equal decline in service and thus quality of life for military member.
- 3. Affect on federal employees.
  - a. The privatization of housing will result in the elimination of those government employee positions which support family housing.
  - b. Even other garrison directorates/activities that support family housing will result in the elimination of jobs/positions (e.g., DECAM).
- 4. Prospects of civilians living on base.
  - a. Civilians allowed to rent units not rented by military families.
  - b. This prospect raises some issues, such as security concerns and law enforcement roles.

## **IX. UTILITIES PRIVATIZATION.**

- A. Authority. 10 U.S.C. 2688 (originally enacted as part of the FY 1998 National Defense Authorization Act) permits the service secretaries to convey all or part of a utility system to a municipal, private, regional, district, or cooperative utility company. This permanent legislation supplements several specific land conveyances involving utilities authorized in previous National Defense Authorization Acts.
- B. Implementation.

1. The DOD goal is to privatize all utility systems (water, wastewater, electric, and natural gas) by 30 September 2003, except those needed for unique security reasons or when privatization is uneconomical. Defense Reform Initiative Directive (DRID) #49—Privatizing Utility Systems. While DRID #49 does not specifically direct the privatization of steam, hot and chilled water, and telecommunications at this time, it does not prohibit such privatization. The overall objective is to get DOD “out of the business” of owning, managing, and operating utility systems by privatizing them.
2. In FY99, the Army privatized (or exempted) 37 systems. Current plans are to privatize 100 systems in FY00, 100 systems in FY01, and 83 systems in FY02.
3. Requests for exemption from utility systems privatization must be approved by the Secretary of the Army. Exemption request, which must be forwarded through the appropriate MACOM to OACSIM, must include:
  - a. Letter from installation commander to MACOM request exemption from privatization;
  - b. Endorsement by MACOM to OACSIM;
  - c. Written synopsis of process conducted to solicit for award, including analysis, alternatives, feasibility, and results;
  - d. Completed economic analysis; and
  - e. Separate letters from the contracting officer and legal counsel concurring with the analysis, review, and decision to request exemption. U.S. Dep’t of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000).
4. Installations shall use competitive procedures to sell (privatize) utility systems and to contract for receipt of utility services. 10 U.S.C. §2688(b). DOD may enter into 50-year contracts for utility service when conveyance of the utility system is included. 10 U.S.C. §2688(c)(3).

5. Any consideration received for the conveyance of the utility system may be accepted as a lump sum payment, or a reduction in charges for future utility services. If the consideration is taken as a lump sum, then payment shall be credited at the election of the Secretary concerned for utility services, energy savings projects, or utility system improvements. If the consideration is taken as a credit against future utility services, then the time period for reduction in charges for services shall not be longer than the base contract period. 10 U.S.C. §2688(c).
6. Installations may, with Secretary approval, transfer land with a utility system privatization. 10 U.S.C. § 2688(i)(2); U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000). In some instances (environmental reasons) installations may want to transfer the land under wastewater treatment plants.
7. Installations must submit notice to Congress of any utility system privatization. The notice must include an analysis demonstrating that the long-term economic benefit of the utility privatization exceeds the long-term economic cost, and that the conveyance will reduce the long-term costs to the Department concerned for utility services provided by the subject utility system. The installation must also wait 21 days after providing such congressional notice. 10 U.S.C. §2688(e).

C. Current Legal Issues.

1. The Affect of State Law and Regulation. State utility law and regulation, the application of which would result in sole-source contracting with the company holding the local utility franchise at each installation, do not apply to federal utility privatization. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125 (holding that 10 U.S.C. § 2688 does not contain an express and unequivocal waiver of federal sovereign immunity). The DOD General Counsel has issued an opinion that reached the same conclusion. Dep't. of Def. General Counsel, The Role of State Laws and Regulations in Utility Privatization (Feb. 24, 2000).

2. Bundling. An agency may employ restrictive provisions or conditions (such as bundling) only to the extent necessary to satisfy the agency's needs. Bundled utility contracts, which not only achieve significant cost savings, but also ensure the actual privatization of all utility systems, are proper. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125.
3. Reversionary Clauses. The contractual agreement must protect the government's interests in the event of a default termination. The use of reversionary clauses, which revoke the conveyance of the utility system, are but one option. Presently, the Army General Counsel's Office does not favor the use of reversionary clauses as the means to accomplish this end.
4. Affect of A-76. Privatization of Army-owned utility systems does not involve OMB A-76 (no cost comparison required).
5. Right of First Refusal. Presently, private sector companies already operate many Army installation utility plants. As the OMB Circular A-76 rules do not apply to utility privatization actions, there is no automatic "right of first refusal" for affected government employees. However, the privatization negotiations may include the placement of current personnel.
6. Model Solicitation for Utilities System Privatization. The Defense Energy Support Center (DESC) is presently working on a model solicitation that installations may use for utility system privatization efforts.

## **X. CONCLUSION.**

- A. Service contracting plays a major role in installation contracting, especially in the wake of the competitive sourcing push. Moreover, competitive sourcing and privatization projects are prevalent within DOD.
- B. As attorneys, you may find yourself advising commanders and functional experts on the competitive sourcing and privatization process. Thus, you should familiarize yourself with several substantive areas, such as labor, standards of conduct, and contracting.



## APPENDIX A

### COMPETITIVE SOURCING AND PRIVATIZATION REFERENCES

1. 10 U.S.C. §§ 2460-2469.
2. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382.
3. Federal Office of Management and Budget Circular A-76 (4 Aug. 1983; Revised 1999), Performance of Commercial Activities.
4. Federal Office of Management and Budget Circular A-76 Revised Supplemental Handbook, Performance of Commercial Activities (March 1996; Revised 1999).
5. General Servs. Admin., et.al., Federal Acquisition Reg. Subpt. 7.3 (June 1997).
6. General Servs. Admin., et.al., Federal Acquisition Reg. Subpt. 9.5 (June 1997).
7. General Servs. Admin., et.al., Federal Acquisition Reg., Pt. 37 (June 1997).
8. U.S. Dep't of Defense, Dir. 4100.15, Commercial Activities Program (10 Mar. 1989).
9. U.S. Dep't of Defense, Instr. 4100.33, Commercial Activities Program Procedures (9 Sept. 1985).
10. U.S. Dep't of Army, Reg. 5-20, Commercial Activities Program (1 Oct 1997).
11. U.S. Dep't of Army, Pam. 5-20, Commercial Activities Study Guide (July 1998).
12. Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracts, 59 Fed. Reg. 26,818 (1994).
13. Office of Federal Procurement Policy Letter 92-1, Inherently Governmental Functions, 57 Fed. Reg. 45,101 (1992).
14. Office of Federal Procurement Policy Letter 91-2, Policy Letter on Service Contracting, 56 Fed. Reg. 15,110 (1991).
15. U.S. Dep't of Defense Reform Initiative Directive #49-Privatizing Utility Systems (23 Dec. 1998).
16. Memorandum, Acting General Counsel, U.S. Dep't of Defense Office of the General Counsel to the General Counsels of the Military Departments, subject: The Role of State Laws and Regulations in Utility Privatization (24 Feb 2000).
17. U.S. Dep't of Army, Privatization of Army Utility Systems Brochure (May 1999).
18. U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000).
19. U.S. Dep't of Air Force Pol. Dir. 38-2, Manpower (Mar. 1995).
20. U.S. Dep't of Air Force Pol. Dir. 38-6, Outsourcing and Privatization (Sep. 1997).
21. U.S. Dep't of Air Force Instr. 38-203, Commercial Activities Program (Apr. 1994).
22. U.S. Dep't of the Air Force, Commercial Activities Program Instruction (AFCAPI) (July 1998).
23. U.S. Dep't of Navy, Secretary of the Navy Instr. 4860.44F, Commercial Activities (Sep. 1989).

## **APPENDIX B**

### **COMPETITIVE SOURCING WEB SITES**

<http://www.defenselink.mil> (General topics of interest in DOD)

<http://www.hqda.army.mil/acsim> (Army competitive sourcing)

<http://www.afcqm1.randolph.af.mil> (Air Force competitive sourcing)

<http://www.fac131.navfac.navy.mil/csso> (Navy competitive sourcing)

<http://www.arnet.gov> (Acquisition reform network)

<http://www.acq.osd.mil/iai/hrso> (DOD housing privatization home page)

<http://gao.gov> (GAO reports and decisions)

*Chapter 25*  
**Nonappropriated Fund  
Contracting**



*146th Contract Attorneys Course*

## CHAPTER 25

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## **CHAPTER 25**

### **NONAPPROPRIATED FUND CONTRACTING**

#### **I. INTRODUCTION.**

#### **II. REFERENCES.**

- A. 10 U.S.C. § 3013(b)(9).
- B. 10 U.S.C. § 2783.
- C. DOD Instruction 4105.67, Nonappropriated Fund (NAF) Procurement Policy (2 Oct. 1981) [hereinafter DOD Instr. 4105.67].
- D. Army Federal Acquisition Regulation Supplement (AFARS), Subpart 1.90, Nonappropriated Funds (1 June 1996) (providing that implementing policies and procedures for NAF acquisitions are established by the Assistant Chief of Staff for Installation Management).
- E. Army Regulations.
  - 1. AR 215-4, Nonappropriated Fund Contracting (10 September 1990); AR 215-1, Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities (25 October 1998).
  - 2. AR 415-15 and AR 420-10 govern construction contracting.

#### **III. DEFINITIONS AND STATUTORY CONTROLS.**

- A. Nonappropriated Fund Instrumentality (NAFI). AR 215-1, Consolidated Glossary, Sec. II, Terms.

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A U.S. Government organization and fiscal entity that performs essential Government functions. It is not a Federal Agency. It acts in its own name to provide . . . MWR and other programs for military personnel, their families, and authorized civilians. . . . As a fiscal entity it maintains custody of and control over its NAFs, equipment, facilities, land, and other assets. It is responsible for the prudent administration, safeguarding, preservation, and maintenance of those APF resources made available to carry out its function. . . . It is not incorporated under the laws of any State . . . and enjoys the legal status of an instrumentality of the United States.

B. Nonappropriated Funds (NAFs). AR 215-1, Consolidated Glossary, sec. II, Terms.

Cash and other assets received by NAFIs from sources other than Congressional appropriations. NAFs are government funds used for the collective benefit of those who generate them. These funds are separate and apart from funds that are recorded in the books of the Treasurer of the United States.

C. Statutory Controls on Funds. Congress has directed DOD to issue regulations governing the management and use of NAFs, and has made DOD personnel subject to penalties for their misuse. All NAFIs are created by DOD and its components, and all NAFs are government funds. However, NAFs are not appropriated by Congress or controlled by the Treasury Department. NAFIs, as fiscal entities, control their NAFs. 10 U.S.C. § 2783. See Appendix A. Nevertheless, Congress may control the use of NAFs. For example:

1. A NAFI in the United States may purchase beer and wine only from in-State sources. 10 U.S.C. § 2488. See AR 215-1, para. 7-12b; AR 215-4, para. 5-57. Cf. AR 215-1, para. 7-12a (Major commands (MACOMs) set the policy governing the source of alcoholic beverages outside the United States).

2. NAFIs located on military installations outside the United States must price and distribute wines produced in the United States equitably when compared with wines produced by the host nation. 10 U.S.C. § 2489. See AR 215-1, para. 7-20.

#### IV. AUTHORITY TO CONTRACT.

- A. General. Only warranted contracting officers are authorized to execute, administer, and terminate NAF contracts. The authority of these contracting officers is limited by their warrant.
  1. Emergency purchase procedure exception. When unforeseeable events occur that are likely to cause a loss of NAFI property or assets if immediate action is not taken, unwarranted individuals may incur obligations on behalf of a NAFI. AR 215-4, para. 2-16.
  2. The chief of the NAF contracting office may appoint individuals to make purchases totaling \$2,500 or less after normal duty hours. These buyers must obtain funding before making a purchase. AR 215-4, paras. 2-16a(2) (b) and 3-5c.
- B. Contracting Officers.
  1. Army Rules. Four types of contracting officers support Army NAFIs. AFARS 1.9002; AR 215-4, paras. 1-6 through 1-9 and 3-11 and 3-12. These include:
    - a. Installation NAF contracting officers.
      - (1) Installation commanders or their designees appoint NAF contracting officers in writing. NAF contracting officers must meet mandatory training requirements and act within the limitations set forth in their warrants.



- (2) There are regulatory dollar limitations on a NAF contracting officer's authority to contract. AR 215-4, para. 1-6h and app. B.
    - (a) For supplies, services, or construction, the NAF contracting officer may obligate up to \$25,000.<sup>1</sup>
    - (b) The NAF contracting officer's authority to issue delivery orders against competitively-awarded contracts is unlimited, except as set forth in the basic contract or limited by the installation commander. See AR 215-4, para. 4-17.
  - (3) Installation NAF contracting officers may use small purchase procedures similar to the simplified acquisition procedures in FAR Part 13. AR 215-4, ch. 4, Sec. II.
- b. Appropriated fund (APF) contracting officers.
- (1) An APF contracting officer may manage a NAF acquisition for supplies and services if the contract value is expected to exceed the NAF contracting officer's warrant, or a complex contract action is anticipated (regardless of dollar amount) that is beyond the NAF contracting officer's expertise. AR 215-4, paras. 1-8d and 3-11.
  - (2) An APF contracting officer must adhere to NAF policies and procedures when procuring supplies or services on behalf of a NAFI. AR 215-4, para. 3-11.
- c. Centralized NAF contracting agencies at the MACOM level may conduct acquisitions in excess of \$25,000. AR 215-4, para. 3-12.

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<sup>1</sup> In 1995, the threshold increased to \$100,000, but this regulatory change expired. As a result, new NAF warrants are capped at \$25,000. Contracting officers issued \$100,000 warrants have been grandfathered, and by exception granted by the Office of the Deputy Chief of Staff for Personnel, installation commanders may issue new warrants in excess of \$25,000.

- d. NAF contracting officer, United States Army Community and Family Support Center (USACFSC).
  - (1) Contracting officers assigned to the USACFSC contracting office may solicit, award, and administer supply and service contracts that exceed the limitations placed on the installation NAF contracting officer. AR 215-4, para. 3-12.
  - (2) Installations purchasing automatic data processing equipment, information management services, and items that exceed the warrant of the installation NAF contracting officer must forward purchase requests through their MACOM to the USACFSC Contracting Division for action. AR 215-4, para. 1-13.1.a.

**V. APPROVAL AND COORDINATION. AR 215-4, para. 1-12 and Appendix B.**

**A. Initiating the Process.**

- 1. Forms. Army NAF Purchase Request (DA Form 4065-R).
- 2. The requesting activity begins the NAF acquisition process by submitting to the contracting officer a DA Form 4065-R that shows funds are available and the activity has obtained the required approvals.

**B. Approval Authorities.**

- 1. The Assistant Director of Community and Family Activities (ADCFA) is the approval authority for:
  - a. Purchases of supplies, services, or entertainment costing \$25,000 or less. AR 215-4, para. 1-12a.
  - b. Purchases of resale merchandise without limitation as to cost. AR 215-4, para. 5-54.

2. Installation commanders or their designees must approve purchase requests that exceed \$25,000. AR 215-4, para. 1-12a.

C. Additional Requirements for Construction Projects. AR 215-1, ch. 10, Section II.

1. NAFIs must coordinate with the servicing Director of Public Works (DPW) concerning all maintenance, repair, and construction of real property facilities used to support morale, welfare, and recreation (MWR) activities. All existing and planned MWR facilities are included in the installation master plan. AR 215-1, para. 10-4a.
2. United States Army Corps of Engineers (USACE) Architectural and Engineering Instructions (AEI) provide initial project planning, but NAF construction must conform to applicable commercial building codes as appropriate. AR 215-1, para. 10-4f.
3. Funding approval limitations for MWR construction projects are set forth in AR 215-1, paras. 10-4 through 10-7, and the corresponding Army regulations governing construction. See AR 415-19 for projects financed wholly by NAFs.
4. There are limitations on combining APFs with NAFs and/or private funds in a single construction project. Before combining funds, the contracting officer must obtain prior written approval as follows:
  - a. The MACOM commander for construction projects costing up to \$300,000. AR 215-1, para. 10-4c(3)(a). See also, AR 415-19, para. 2.1b, for additional requirements.
  - b. The Facilities and Housing Directorate (DAIM-FDR, OACSIM) for construction projects costing between \$300,000 and \$1.5 million. AR 215-1, para. 10-4c(3)(b).
  - c. The Office of the Deputy Assistant Secretary of the Army (Installations and Housing) for construction projects costing more than \$1.5 million. AR 215-1, para. 10-4c(3)(c).

## VI. COMPETITION AND SOURCES OF SUPPLIES AND SERVICES.

- A. Competition. The Competition in Contracting Act (CICA) does not apply to NAFIs unless appropriated funds are obligated. 10 U.S.C. § 2303; Gino Morena Enters., B-224235, Feb. 5, 1987, 87-1 CPD ¶ 121.
1. Although statutory requirements do not apply to NAFI acquisitions involving only NAFs, regulations require maximum practicable competition. Sole source procurements must be justified. AR 215-4, para. 1-6g(2).
    - a. For purchases of \$5,000 or less (\$50,000 for resale),<sup>2</sup> NAFIs need not seek competition if the price obtained is fair and reasonable and purchases are distributed equitably among qualified suppliers. AR 215-4, para. 1-11a. For purchases costing more than \$5,000, NAFIs must compete the acquisitions (except those for commercial entertainment) unless a sole source acquisition is justified. AR 215-4, para. 1-11b. Competition exists if the activity solicits at least three responsible offerors; the offerors submit offers independently; and the activity receives at least two responsive offers. AR 215-4, para. 1-11b(1).
    - b. NAFIs may, but need not, synopsise acquisitions in the Commerce Business Daily (CBD). AR 215-4, para. 4-6.
  2. Sole source acquisitions. AR 215-4, para. 3-10 specifies when a sole source acquisition is appropriate. Contracting officers must approve all sole source acquisitions except those due to an unusual and compelling urgency. Installation commanders or their designees must approve all sole source acquisitions due to unusual or compelling urgency.
- B. Approved Sources.
1. Government sources of supply for NAFI requirements include the General Services Administration (GSA), Defense Supply Depots, and commissaries. AR 215-4, para. 4-1.

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<sup>2</sup> The regulation still indicates that the competition threshold is \$2,500. HQDA, however, raised the competition threshold in response to a request for a regulatory waiver.

2. Other NAF sources include, but are not limited to, the Army and Air Force Exchange Service (AAFES), the Navy Resale System Office, and the Marine Corps Exchange System. AR 215-4, para. 4-1.
3. FAR Subparts 8.6 and 8.7, which require activities to purchase certain supplies from the Federal Prison Industries, Inc., and the blind or severely disabled, apply to NAF acquisitions. 18 U.S.C. § 4124; 41 U.S.C. §§ 46-48; AR 215-4, para. 4-2.
4. NAFIs may solicit commercial vendors. Activities may use solicitation mailing lists developed by the NAF contracting office or obtained from the APF contracting office. AR 215-4, para. 4-4.

C. Prohibited Sources.

1. A NAFI may not contract with government or NAFI employees unless the NAFI cannot meet its needs otherwise, or there is some other compelling reason for so doing. AR 215-4, para. 4-3. Installation commanders or their designees must approve any exceptions.
2. Generally, NAFIs may not solicit or consent to subcontracts with firms or individuals that have been suspended, debarred, or proposed for debarment. AR 215-4, para. 4-5.

3. Historically, APF activities could not contract with NAFIs unless a sole source procurement was justified. See Departments of the Army & Air Force, Army & Air Force Exchange Serv., B-235742, Apr. 24, 1990, 90-1 CPD ¶ 410; Obtaining Goods & Servs. from Nonappropriated Fund Activities Through Intra-Dept. Procedures, B-148581, Nov. 21, 1978, 78-2 CPD ¶ 353; AR 215-1, para. 7-34c; AR 60-20, para. 2-7 (forbidding AAFES to bid on APF contracts). 10 U.S.C. § 2424, however, allows a limited exception for in-stock purchases up to \$50,000 from overseas exchanges. Additionally, DOD NAFIs may "enter into contracts or other agreements" with other DOD departments, agencies, or instrumentalities "to provide or obtain goods and services beneficial to the efficient management and operation of the exchange system or that morale, welfare, and recreation system." 10 U.S.C. § 2482a. See Memorandum from Director for Procurement and Industrial Base Policy, subject: Army Federal Acquisition Regulation Supplement -- 13.90 (30 April 1999) (authorizing use of government credit cards to purchase from the Army and Air Force Exchange Service (AAFES) or other NAFIs). Note, however, that:
  - a. 10 U.S.C. § 2482a does not appear to provide relief from the CICA competition requirements applicable to APF purchases from NAFIs;
  - b. There is no statutory definition of "other agreements"; and
  - c. There is no indication of the meaning of the requirement that the transaction be beneficial to the NAFI.

## VII. ACQUISITION METHODS.

- A. DOD Policy. DOD Instr. 4105.67, para. D.1, provides that NAFIs shall conduct procurements:
  1. Primarily through competitive negotiation;
  2. By trained procurement personnel;

3. In a fair, equitable, and impartial manner; and
4. To the advantage of the NAFI.

B. Small Purchases. AR 215-4, ch. 4, sec. II.

1. When making small purchases, the NAF contracting officer may solicit price quotations orally, but AR 215-4 requires written solicitations for construction contracts exceeding \$2,000 and service contracts exceeding \$2,500. AR 215-4, paras. 4-9 and 4-10.
2. The contracting officer may issue purchase orders for the future delivery of supplies, or for the future performance of nonpersonal services, costing \$10,000 or less. AR 215-4, para. 4-14. The purchase order obligates the NAFI to pay the amount stated on the order if the contractor performs. AR 215-4, para. 4-15.
3. Blanket Purchase Agreements (BPAs) provide a simplified method of making small purchases. By establishing a BPA with a vendor, the NAFI eliminates the need for repetitive purchase orders. AR 215-4, paras. 4-12 and 4-13.
4. Contracting officers may issue delivery orders for the future delivery of supplies, or the future performance nonpersonal services, against existing contracts. The NAFI must pay the amount stated on the order if the contractor performs. AR 215-4, para. 4-17.

C. Negotiated Acquisitions. AR 215-4, ch. 4, sec. III.

1. Negotiation is the preferred method of contracting for supplies and services that NAFIs cannot procure using small purchase procedures.
2. Negotiation procedures.
  - a. Request for proposals (RFP). AR 215-4, paras. 4-22 through 4-30.

- b. Late proposals and late modifications. AR 215-4, para. 4-31.
- c. Evaluation of offers. AR 215-4, paras. 4-33 through 4-37.
- d. Contract award. AR 215-4, paras. 4-38 and 4-39.
- e. Mistakes. AR 215-4, para. 4-41.
- f. Protests. AR 215-4, para. 4-40.

D. Sealed Bidding. AR 215-4, ch. 4, sec. IV.

- 1. Sealed bidding is not preferred for NAFI contracting. It may be used only if:
  - a. Price is the only evaluation factor;
  - b. Current and accurate purchase descriptions or specifications have been developed;
  - c. Time permits the solicitation, submission, and evaluation of bids;
  - d. Discussions with bidders are unnecessary; and
  - e. There is a reasonable expectation of receiving more than one sealed bid. See AR 215-4, para. 4-43.
- 2. Sealed bidding procedures. AR 215-4, paras. 4-44 through 4-47.
  - a. Invitations for bids (IFBs). AR 215-4, para. 4-44.



- b. Late bids, late bid modifications, and late bid withdrawals. AR 215-4, para. 4-45.7.
  - (1) The five-day rule.
  - (2) The government mishandling rule.
  - (3) Late modification of successful bid.
- c. Amendment and cancellation of bids. AR 215-4, paras. 4-45.5 and 4-45.6.
- d. Mistakes. AR 215-4, paras. 4-46.1 and 4-46.2.
- e. Contract award. AR 215-4, para. 4-47.
- f. Protests. AR 215-4, para. 4-48.

## **VIII. CONTRACT TYPES. AR 215-4, ch. 5.**

- A. Fixed-Price vs. Cost-Reimbursement. AR 215-4, ch. 5, sec. I.
  - 1. NAFI contracts must be fixed-price if possible. DOD Instr. 4105.67(D)(6)(b); AR 215-4, para. 5-1b.
  - 2. A NAF contracting officer may use a contract type other than fixed-price only if its use is justified in writing, it is reviewed for legal sufficiency (regardless of dollar value), and the MACOM and HQ, USACFSC approve. AR 215-4, para. 5-1b.

3. NAFIs use a service contract format if an acquisition involves a lease (rather than a purchase) of equipment. AR 215-4, para. 5-4b
  4. Labor standards requirements. The Service Contract Act (SCA) applies to all service contracts expected to exceed \$2,500. AR 215-4, para. 5-9.
- B. Socioeconomic Policies. The Small Business Act does not apply to NAF service contracts. AR 215-4, para. 1-16.
- C. Construction and Architect-Engineer (A-E) Contracts. AR 215-4, ch. 5, sec. III.
1. The process for awarding NAF construction and A-E service contracts is similar to that for the same type of APF contracts.
  2. Performance and payment bonds are required for construction projects that exceed \$25,000. AR 215-4, para. 5-14l.
  3. Labor standards. The Davis-Bacon Act, the Copeland Act, and Contract Work Hours and Safety Standards Act apply to construction contracts that exceed \$2,000. AR 215-4, paras. 1-19 and 1-20. See DA Form 4075-R, dated August 1990.
  4. Socioeconomic policies.
    - a. The Small Business Act does not apply. AR 215-4, para. 1-16.
    - b. The Buy American Act applies. AR 215-4, para. 1-17.

D. Supply and Equipment Contracts. AR 215-4, ch. 5, sec. VIII.

1. If an acquisition involves both supplies and services, the contracting officer may require contractors to submit separate offers or quotes for each line item. AR 215-4, para. 5-59b.
2. NAFIs may order from federal supply schedules. AR 215-4, para. 5-72a.
3. Socioeconomic policies.
  - a. The Small Business Act does not apply.
  - b. The Buy American Act, the Trade Agreement Act, and the Balance of Payments Program apply to NAFI supply acquisitions. AR 215-4, paras. 1-17, 1-21, and 1-22.

E. Concession Contracts. AR 215-4, ch. 5, sec. IV.

1. A concession contract is a license or permit for an activity/business to sell goods and services to authorized patrons.
2. Before a concession contract is awarded, the installation commander must determine that the need cannot be met through a NAF direct-hire and must authorize the MWR activity to operate a resale activity by concession contract. AR 215-4, para. 5-19.
3. The NAFI receives a flat fee or percentage of gross sales from the concessionaire. AR 215-4, para. 5-17.
4. If a service is involved, the contract must contain a SCA wage determination. AR 215-4, para. 5-22. See Ober United Travel Agency, Inc. v. Department of Labor, 135 F.3d 822 (D.C. Cir. 1998) (citing DOL provision that adopts contractor gross receipts under a concession contract as the contract "value").

F. Entertainment Contracts. AR 215-4, ch. 5, sec. V.

1. AR 215-4 does not normally require competition for these contracts; however, it does prohibit the exclusive use of one entertainer or agent. AR 215-4, para. 5-31.
2. The SCA may apply if the entertainment requires the use of stage hands or other technicians.
3. The contract must contain a cancellation clause and a liquidated damages clause. AR 215-4, para. 5-32.

G. Contracts with Amusement Companies and Traveling Shows. AR 215-4, ch. 5, sec. VI.

1. Installation commanders or their designees must approve these activities.
2. Competition is required unless a nationally known company is involved.
3. Responsibility determinations are particularly important in these acquisitions. Contractors must provide references. AR 215-4, para. 5-40.

H. Resale--Consumables and Subsistence Contracts. AR 215-4, ch. 5, sec. VII. The ADCFA has unlimited dollar approval authority for resale items.

1. Alcoholic beverages are considered subsistence items. Only a contracting officer may purchase them.
2. Purchases of wine and malt beverages must be from in-state sources. There are special rules for the State of Washington. All alcoholic beverage purchases (including hard liquor) in Alaska and Hawaii must be from in-state sources.

I. Commercial Sponsorship. AR 215-1, para. 7-47.

1. Definition. "Commercial sponsorship is the act of providing assistance, funding, goods, equipment (including fixed assets), or services to a MWR program(s) or event(s) by . . . [a sponsor] . . . for a specific (limited) period of time in return for public recognition or opportunities for advertising or other promotions." AR 215-1, para. 7-47a.
2. Procedures. Activities using commercial sponsorship procedures must ensure that:
  - a. Obligations and entitlements of the sponsor and the MWR program are set forth in a written agreement that does not exceed one year. AR 215-1, para. 7-47c(2);
  - b. The activity disclaims endorsement of any supplier, product, or service in any public recognition or printed material developed for the sponsorship event. AR 215-1, para. 7-47c(5);
  - c. The commercial sponsor certifies in writing that it shall not charge costs of the sponsorship to any part of the government. AR 215-1, para. 7-47c(9); and
  - d. Officials responsible for contracting are not directly or indirectly involved with the solicitation of commercial vendors, except for those officials who administer NAF contracts. AR 215-1, para. 7-47d(3).

J. MWR Advertising. AR 215-1, para. 7-44.

**IX. LITIGATION INVOLVING NONAPPROPRIATED FUND CONTRACTS.**

A. Protests. AR 215-4, para. 4-40.

1. GAO Jurisdiction.

- a. NAFI procurements. The GAO lacks jurisdiction over procurements conducted by NAFIs since its authority extends only to "federal agency" acquisitions. See 31 U.S.C. § 3551; 4 C.F.R. § 21.5(g) (GAO bid protest rule implementing statute). A NAFI is not a "federal agency." See DSV, GmbH, B-253724, June 16, 1993, 93-1 CPD ¶ 468. Protests are resolved under AR 215-4, para. 4-40.
- b. Procurements conducted by an APF contracting officer. The GAO has jurisdiction over procurements conducted "by or for a federal agency," regardless of the source of funds involved. Barbarosa Reiseservice GmbH, B-225641, May 20, 1987, 87-1 CPD ¶ 529. See AR 215-4, para. 4-40a(2).
  - (1) APF activities may provide "in-kind" support to NAFIs. Any APF contracting in support of NAFIs is subject to the Competition in Contracting Act.
  - (2) Per DOD policy, activities may provide APFs directly to NAFIs for authorized items of APF support. Memorandum, Assistant Secretary of Defense, subject: DOD Morale, Welfare and Recreation Utilization, Support and Accountability (DOD MWR USA) Practice (23 July 1997).
- c. The GAO may consider a protest involving a NAFI if it is alleged that an agency is using a NAFI to avoid competition requirements. Premier Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8; LDDS Worldcom, B-270109, Feb. 6, 1996, 96-1 CPD ¶ 45 (no evidence Exchange was acting as a conduit for Navy or Navy participation was pervasive).

d. The GAO will consider a protest involving a NAFI-conducted procurement if there is evidence of pervasive involvement of federal agency personnel in the procurement and the NAFI is acting merely as a conduit for the federal agency. See Thayer Gate Dev. Corp., B-242847.2, Dec. 9, 1994 (unpub.) (involvement of high ranking Army officials in project did not convert procurement by a NAFI to one conducted by the Army).

2. In MCI Telecommunications Corp. v. Army & Air Force Exchange Serv., No. 95-0607, 1995 U.S. Dist. LEXIS 12947 (D.D.C. May 9, 1995) (mem.), the court found no Scanwell standing in a suit against AAFES. But see 28 U.S.C. § 1491(b) (1) (granting pre-award and post-award protest jurisdiction to the Court of Federal Claims (COFC) and the district courts per amendment to the Tucker Act by the Administrative Disputes Resolution Act of 1996. This amendment, however, does not expressly include protests of exchange service contracting actions). Compare COFC claims jurisdiction at 28 U.S.C. § 1491(a)(1).

B. Disputes. AR 215-4, ch. 7, sec. II.

1. The requirement for a final decision.

a. If the contracting officer fails to resolve a dispute arising under or relating to the contract, the contracting officer issues a final decision per the disputes clause contained in the NAF contract. AR 215-4, paras. 7-11 and 7-12.

b. The contracting officer's decision lacks finality if it advises the contractor of its appeal rights under the contract incorrectly and the contractor is prejudiced by the deficiency. Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996); Wolverine Supply, Inc., ASBCA No. 39250, 90-2 BCA ¶ 22,706.

2. No judicial forum has jurisdiction over NAFI contract disputes, except those disputes arising under contracts involving the exchange services. As instrumentalities of the United States, NAFIs are immune from suit. Congress has not waived immunity for NAFIs under the Tucker Act (28 U.S.C. § 1346(a)(2)), the Contract Disputes Act (41 U.S.C. § 602(a)), or the Administrative Procedures Act. See Swift-Train Co. v. United States, 443 F.2d 1140 (5<sup>th</sup> Cir. 1971); Borden v. United States, 116 F. Supp. 873 (E.D.N.Y. 1953); Commercial Offset Printers, Inc., ASBCA No. 25302, 81-1 BCA ¶ 14,900.
  - a. Exception. Express or implied-in-fact contracts entered into by DOD, Coast Guard, and NASA exchange services, although NAFIs, are contracts of the United States for purposes of determining jurisdiction under the Tucker Act and the Contract Disputes Act. 28 U.S.C. § 1491(a)(1).
  - b. The Court of Appeals for the Federal Circuit (CAFC) held that the COFC has jurisdiction over a contract dispute with the Navy Resale and Services Support Office (NAVRESSO) even though it is a NAFI and the Tucker Act does not explicitly waive sovereign immunity for NAFIs. McDonald's Corp. v. United States, 926 F.2d 1126 (Fed. Cir. 1991).
3. The Armed Services Board of Contract Appeals (ASBCA) has jurisdiction over NAF contract disputes if:
  - a. The contract incorporates a disputes clause that grants such jurisdiction. COVCO Hawaii Corp., ASBCA No. 26901, 83-2 BCA ¶ 16,554.
  - b. The contract contains no disputes clause, but DOD regulations require incorporation of a jurisdiction-granting clause in the NAF contract. Recreational Enters., ASBCA No. 32176, 87-1 BCA ¶ 19,675.



4. The CAFC has refused to hear appeals from decisions of the ASBCA concerning NAFI contracts. Strand Hunt Constr., Inc. v. West, 111 F.3d 142 (Fed. Cir. 1997) (unpub); Maitland Bros. v. Widnall, 41 F.3d 1521 (Fed. Cir. 1994) (unpub).
5. The ASBCA has refused to read the Protest After Award clause into a NAF contract awarded by an APF contracting officer, even though the clause was required by regulation. F2M, Inc., ASBCA No. 49719, 97-2 BCA ¶ 28,982.

## **X. CONCLUSION.**

## APPENDIX A

### **Title 10, Section 2783 Nonappropriated Fund Instrumentalities: Financial Management and Use of Nonappropriated Funds**

**(a) REGULATION OF MANAGEMENT AND USE OF NONAPPROPRIATED FUNDS.—**The Secretary of Defense shall prescribe regulations governing—

- (1) the purposes for which nonappropriated funds of a nonappropriated fund instrumentality of the United States within the Department of Defense may be expended; and
- (2) the financial management of such funds to prevent waste, loss, or unauthorized use.

**(b) PENALTIES FOR VIOLATIONS.—**

- (1) A civilian employee of the Department of Defense who is paid from nonappropriated funds and who commits a substantial violation of the regulations prescribed under subsection (a) shall be subject to the same penalties as are provided by law for misuse of appropriations by a civilian employee of the Department of Defense paid from appropriated funds. The Secretary of Defense shall prescribe regulations to carry out this paragraph.
- (2) The Secretary shall provide in regulations that a violation of the regulations prescribed under subsection (a) by a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is punishable as a violation of section 892 of such title (article 92) of the Uniform Code of Military Justice).

**(c) NOTIFICATION OF VIOLATIONS.—**

- (1) A civilian employee of the Department of Defense (whether paid from nonappropriated funds or from appropriated funds), and a member of the Armed Forces, whose duties include the obligation of nonappropriated funds, shall notify the Secretary of Defense of information which the person reasonably believes evidences—
  - (A) a violation by another person of any law, rule, or regulation regarding the management of such funds; or
  - (B) other mismanagement or gross waste of such funds.
- (2) The Secretary of Defense shall designate civilian employees to receive a notification described in paragraph (1) and ensure the prompt investigation of the validity of information provided in the notification.
- (3) The Secretary shall prescribe regulations to protect the confidentiality of a person making a notification under paragraph (1).

***Chapter 26***  
**Contract Disputes Act**  
**(CDA) Claims**



***146th Contract Attorneys Course***

## **CHAPTER 26**

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## **CHAPTER 26**

### **CONTRACT DISPUTES ACT (CDA) CLAIMS**

#### **I. INTRODUCTION.** As a result of this instruction, the student will understand:

- A. The claims submission and dispute resolution processes provided by the CDA.
- B. The jurisdiction of the Armed Services Board of Contract Appeals (ASBCA) and the U.S. Court of Federal Claims (COFC) to decide appeals from contracting officer final decisions.
- C. The role of the contract attorney in addressing contractor claims, defending against contractor appeals, and prosecuting government claims.

#### **II. OVERVIEW.**

- A. Historical Development.
  - 1. Pre-Civil War Developments. Before 1855, government contractors had no forum in which to sue the United States. In 1855, the Congress created the Court of Claims as an Article I (legislative) court to consider claims against the United States and recommend private bills to Congress. Act of February 24, 1855, 10 Stat. 612. The service secretaries, however, continued to resolve most contract claims. As early as 1861, the Secretary of War appointed a board of three officers to consider and decide specific contract claims. See Adams v. United States, 74 U.S. 463 (1868). Upon receipt of an adverse board decision, a contractor's only recourse was to request a private bill from Congress.



2. Civil War Reforms. In 1863, Congress expanded the power of the Court of Claims by authorizing it to enter judgments against the United States. Act of March 3, 1863, 12 Stat. 765. In 1887, Congress passed the Tucker Act to expand and clarify the jurisdiction of the Court of Claims. Act of March 3, 1887, 24 Stat. 505, codified at 28 U.S.C. § 1491. In that Act, Congress granted the Court of Claims authority to consider monetary claims based on: (1) the Constitution; (2) an act of Congress; (3) an executive regulation; or (4) an express or implied-in-fact contract.<sup>1</sup> As a result, a government contractor could now sue the United States as a matter of right.
3. Disputes Clauses. Agencies responded to the Court of Claim's increased oversight by adding clauses to government contracts that appointed specific agency officials (e.g., the contracting officer or the service secretary) as the final decision-maker for questions of fact. The Supreme Court upheld the finality of these officials' decisions in Kihlberg v. United States, 97 U.S. 398 (1878). The tension between the agencies' desire to decide contract disputes without outside interference, and the contractors' desire to resolve disputes in the Court of Claims, continued until 1978. This tension resulted in considerable litigation and a substantial body of case law.
4. Boards of Contract Appeals (BCAs). During World War I (WWI), the War and Navy Departments established full-time BCAs to hear claims involving wartime contracts. The War Department abolished its board in 1922, but the Navy board continued in name (if not fact) until World War II (WWII). Between the wars, an interagency group developed a standard disputes clause. This clause made contracting officers' decisions final as to all questions of fact. WWII again showed that boards of contract appeals were needed to resolve the massive number of wartime contract disputes. See Penker Constr. Co. v. United States, 96 Ct. Cl. 1 (1942). Thus, the War Department created a board of contract appeals, and the Navy revived its board. In 1949, the Department of Defense (DOD) merged the two boards to form the current ASBCA.

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<sup>1</sup> The Tucker Act did not give the Court of Claims authority to consider claims based on implied-in-law contracts.

5. Post-WWII Developments. In a series of cases culminating in Wunderlich v. United States, 342 U.S. 98 (1951), the Supreme Court upheld the finality (absent fraud) of factual and legal decisions issued under the disputes clauses by agency BCAs. It further held that the Court of Claims could not review board decisions de novo. Congress reacted by passing the Wunderlich Act, 41 U.S.C. §§ 321-322, which reaffirmed that the Court of Claims could review factual and legal decisions by agency BCAs. At about the same time, Congress changed the Court of Claims from an Article I (legislative) to an Article III (judicial) court. Pub. L. No. 83-158, 67 Stat. 226 (1953). Later, the Supreme Court clarified the relationship between the Court of Claims and the agency BCAs by limiting the jurisdiction of the boards to cases "arising under" remedy granting clauses in the contract. See Utah Mining and Constr. Co. v. United States, 384 U.S. 394 (1966).
6. The Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 601-613. Congress replaced the previous disputes resolution system with a comprehensive statutory scheme. Congress intended that the CDA:
  - a. Help induce resolution of more disputes by negotiation prior to litigation;
  - b. Equalize the bargaining power of the parties when a dispute exists;
  - c. Provide alternate forums suitable to handle the different types of disputes; and
  - d. Insure fair and equitable treatment to contractors and Government agencies. S. REP. NO. 95-1118, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235.
7. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. Congress overhauled the Court of Claims and created a new Article I court (i.e., the Claims Court) from the old Trial Division of the Court of Claims. Congress also merged the Court of Claims and the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit (CAFC).<sup>2</sup>

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<sup>2</sup> The Act revised the jurisdiction of the new courts substantially.

8. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 3921. Congress changed the name of the Claims Court to the United States Court of Federal Claims (COFC), and expanded the jurisdiction of the court to include the adjudication of nonmonetary claims.
9. Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. No. 103-355, 108 Stat. 3243. Congress increased the monetary thresholds for requiring CDA certifications and requesting expedited and accelerated appeals.<sup>3</sup>

B. The Disputes Process.

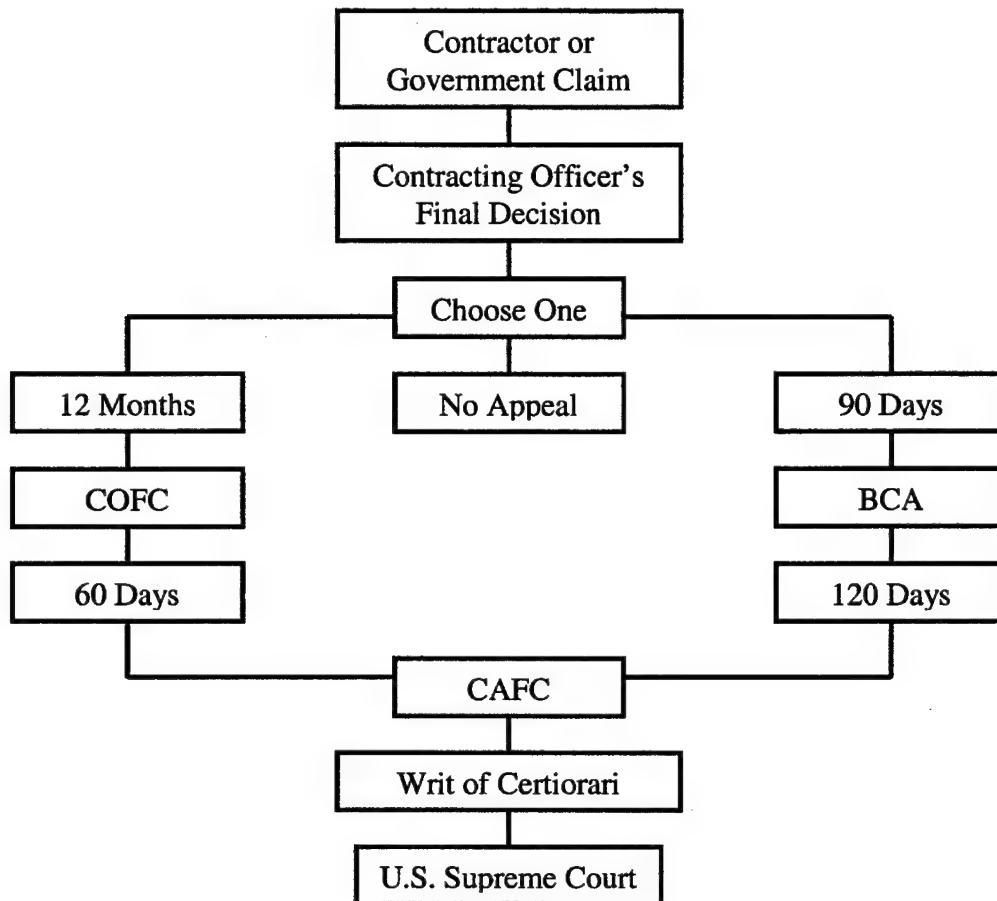
1. The CDA establishes procedures and requirements for asserting and resolving claims subject to the Act.
2. Distinguishing bid protests from disputes.
  - a. In bid protests, disappointed bidders or offerors seek relief from actions that occur before contract award. See generally FAR Subpart 33.1.
  - b. In contract disputes, contractors seek relief from actions and events that occur after contract award. See generally FAR Subpart 33.2.
  - c. The Boards of Contract Appeals lack jurisdiction over bid protest actions. See United States v. John C. Grimberg, Inc., 702 F.2d 1362 (Fed. Cir. 1983) (stating that "the [CDA] deals with contractors, not with disappointed bidders"); Ammon Circuits Research, ASBCA No. 50885, 97-2 BCA ¶ 29,318 (dismissing an appeal based on the contracting officer's written refusal to award the contractor a research contract); RC 27th Ave. Corp., ASBCA No. 49176, 97-1 BCA ¶ 28,658 (dismissing an appeal for lost profits arising from the contracting officer's failure to award the contractor a grounds maintenance services contract).

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<sup>3</sup> This Act represented Congress's first major effort to reform the federal procurement process since it passed the CDA.

3. The disputes process flowchart.

## The Disputes Process



4. The Election Doctrine. The CDA provides alternative forums for challenging a contracting officer's final decision. Once a contractor files its appeal in a particular forum, this election is normally binding and the contractor can no longer pursue its claim in the other forum. The "election doctrine," however, does not apply if the forum originally selected lacked subject matter jurisdiction over the appeal. 41 U.S.C. §§ 606, 609(a)(1). See Bonneville Assocs. v. United States, 43 F.3d 649 (Fed. Cir. 1994) (dismissing the contractor's suit because the contractor originally elected to proceed before the GSBCA); see also Bonneville Assocs. v. General Servs. Admin., GSBCA No. 13134, 96-1 BCA ¶ 28,122 (refusing to reinstate the contractor's appeal), aff'd, Bonneville Assoc. v. United States, 165 F.3d 1360 (Fed. Cir. 1999).

### III. APPLICABILITY OF THE DISPUTES CLAUSE.

#### A. Appropriated Fund Contracts.

1. The CDA applies to most express and implied-in-fact<sup>4</sup> contracts.<sup>5</sup> 41 U.S.C. § 602; FAR 33.203.
2. The Federal Acquisition Regulation (FAR) implements the CDA by requiring the contracting officer to include a Disputes clause in solicitations and contracts.<sup>6</sup> FAR 33.215.
  - a. FAR 52.233-1, Disputes, requires the contractor to continue to perform pending resolution of disputes “arising under”<sup>7</sup> the contract. See Appendix A.
  - b. FAR 52.233-1, Alternate I, Disputes, requires the contractor to continue to perform pending resolution of disputes “arising under or relating to”<sup>8</sup> the contract.<sup>9</sup> See Appendix A.

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<sup>4</sup> An “implied-in-fact” contract is similar to an “express” contract. It requires: (1) “a meeting of the minds” between the parties; (2) consideration; (3) an absence of ambiguity surrounding the offer and the acceptance; and (4) an agency official with actual authority to bind the government. James L. Lewis v. United States, 70 F.3d 597 (Fed. Cir. 1995).

<sup>5</sup> The CDA normally applies to contracts for: (1) the procurement of property; (2) the procurement of services; (3) the procurement of construction, maintenance, and repair work; and (4) the disposal of personal property. 41 U.S.C. § 602. Cf. G.E. Boggs & Assocs., Inc., ASBCA Nos. 34841, 34842, 91-1 BCA ¶ 23,515 (holding that the CDA did not apply because the parties did not enter into a contract for the procurement of property, but retaining jurisdiction pursuant to the disputes clause in the contract).

<sup>6</sup> The CDA—and hence the Disputes clause—does not apply to: (1) tort claims that do not arise under or relate to an express or an implied-in-fact contract; (2) claims for penalties or forfeitures prescribed by statute or regulation that another federal agency is specifically authorized to administer, settle or determine; (3) claims involving fraud; and (4) bid protests. 41 U.S.C. §§ 602, 604, 605(a); FAR 33.203; FAR 33.209; FAR 33.210.

<sup>7</sup> “Arising under the contract” is defined as falling within the scope of a contract clause and therefore providing a remedy for some event occurring during contract performance. RALPH C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 8 (2d ed. 1998).

<sup>8</sup> “Relating to the contract” means having a connection to the contract. The term encompasses claims that cannot be resolved through a contract clause, such as for breach of contract or correction of mistakes. Prior to passage of the CDA, contractors pursued relief for mutual mistake (rescission or reformation) under the terms of Pub. L. No. 85-

B. Nonappropriated Fund (NAF) Contracts.

1. Exchange Service contracts. The CDA applies to contracts with the Army and Air Force, Navy, Marine Corps, Coast Guard, and NASA Exchanges. See 41 U.S.C. § 602(a), 28 U.S.C. §§ 1346, 1491. The CDA does not apply to other nonappropriated fund contracts.<sup>10</sup> See e.g. Furash & Co. v. United States, 46 Fed. Cl. 518 (2000) (dismissing suit concerning contract with Federal Housing Finance Board).
2. The government, however, may choose to include a disputes clause in a non-exchange NAF contract, thereby giving a contractor the right to appeal to a BCA. See AR 215-4, Chapter 7, Section II; D'Tel Communications, ASBCA No. 50093, 97-2 BCA ¶ 29,251 (holding that the board had jurisdiction based on the board's charter and the contract's dispute resolution clause). However, inclusion of such a clause will not give the Court of Federal Claims jurisdiction over a suit brought by a non-Exchange NAFL. See Furash & Co. v. United States, 46 Fed. Cl. 518 (2000).
3. An agency directive granting NAF contractors a right of appeal may serve as the basis for board jurisdiction even when the contract contains no disputes clause. See DODD 5515.6; Recreational Enters., ASBCA No. 32176, 87-1 BCA ¶ 19,675 (board had jurisdiction over NAF contract dispute because DOD directives required contract clause granting a right of appeal).

#### IV. CONTRACTOR CLAIMS.

A. Proper Claimants.

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804 (see FAR 33.205; FAR Part 50, Extraordinary Contractual Actions). RALPH C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 438 (2d ed. 1998).

<sup>9</sup> The Department of Defense (DOD) typically uses this clause for mission critical contracts, such as purchases of aircraft, naval vessels, and missile systems. DFARS 233.215.

<sup>10</sup> In addition, the CDA does not normally apply to: (1) Tennessee Valley Authority contracts; (2) contracts for the sale of real property; or (3) contracts with foreign governments or agencies. 41 U.S.C. § 602; FAR 33.203.

1. Only the parties to the contract (i.e., the prime contractor and the government) may normally submit a claim. 41 U.S.C. § 605(a).
2. Subcontractors.
  - a. A subcontractor can't file a claim directly with the contracting officer. United States v. Johnson Controls, 713 F.2d 1541 (Fed. Cir. 1983) (dismissing subcontractor claim); see also Detroit Broach Cutting Tools, Inc., ASBCA No. 49277, 96-2 BCA ¶ 28,493 (holding that the subcontractor's direct communication with the government did not establish privity); Southwest Marine, Inc., ASBCA No. 49617, 96-2 BCA ¶ 28,347 (rejecting the subcontractor's assertion that the Suits in Admiralty Act gave it the right to appeal directly); cf. Department of the Army v. Blue Fox, 119 S. Ct. 687 (1999) (holding that a subcontractor may not sue the government directly by asserting an equitable lien on funds held by the government). But see Choe-Kelly, ASBCA No. 43481, 92-2 BCA ¶ 24,910 (holding that the board had jurisdiction to consider the subcontractor's unsponsored claim alleging an implied-in-fact contract).
  - b. A prime contractor, however, can sponsor claims (also called "pass-through claims") on behalf of its subcontractors. Erickson Air Crane Co. of Washington, Inc. v. United States, 731 F.2d 810 (Fed. Cir. 1984); McPherson Contractors, Inc., ASBCA No. 50830, 98-1 BCA ¶ 29,349 (appeal dismissed where prime stated it did not wish to pursue the appeal).
3. Sureties. Absent privity of contract, sureties may not file claims. Admiralty Constr., Inc. v. Dalton, 156 F.3d 1217 (Fed. Cir. 1998) (surety must finance contract completion or take over performance to invoke doctrine of equitable subrogation); William A. Ransom and Robert D. Nesen v. United States, 900 F.2d 242 (Fed. Cir. 1990) (discussing doctrine of equitable subrogation); Brent M. Davies, ASBCA No. 51938, 00-1 BCA ¶ 30,678.

4. Dissolved/Suspended Corporations. A corporate contractor must possess valid corporate status, as determined by applicable state law, to assert a CDA appeal. See Micro Tool Eng'g, Inc., ASBCA No. 31136, 86-1 BCA ¶ 18,680 (holding that a dissolved corporation could not sue under New York law). But cf. Fre'nce Mfg. Co., ASBCA No. 46233, 95-2 BCA ¶ 27,802 (allowing a "resurrected" contractor to prosecute the appeal). Allied Prod. Management, Inc., and Richard E. Rowan, J.V., DOT CAB No. 2466, 92-1 BCA ¶ 24,585 (allowing a contractor to appeal despite its suspended corporate status).

B. Definition of a Claim.

1. Contract Disputes Act. The CDA does not define the term "claim." As a result, courts and boards look to the FAR for a definition. See Essex Electro Eng'rs, Inc. v. United States, 960 F.2d 1576 (Fed. Cir. 1992) (holding that the executive branch has authority to issue regulations implementing the CDA, to include defining the term "claim," and that the FAR definition is consistent with the CDA).
2. FAR. The FAR defines a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract." FAR 33.201; FAR 52.233-1.
  - a. Claims arising under or relating to the contract include those supported by remedy granting clauses, breach of contract claims, and mistakes alleged after award.
  - b. A written demand (or written assertion) seeking the payment of money in excess of \$100,000 is not a valid CDA claim until the contractor properly certifies it. FAR 33.201.
  - c. A request for an equitable adjustment (REA) is not a "routine request for payment" and satisfies the FAR definition of "claim." Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995).



d. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a valid CDA claim. FAR 33.201; 52.233-1. A contractor may convert such a submission into a valid CDA claim if:

(1) The contractor complies with the submission and certification requirements of the Disputes clause; and

(2) The contracting officer:

(a) Disputes the submission as to either liability or amount; or

(b) Fails to act in a reasonable time. FAR 33.201; FAR 52.233-1. See S-TRON, ASBCA No. 45890, 94-3 BCA ¶ 26,957 (contracting officer's failure to respond for 6 months to contractor's "relatively simple" engineering change proposal (ECP) and REA was unreasonable).

C. Elements of a Claim.

1. The demand or assertion must be in writing. 41 U.S.C. § 605(a); FAR 33.201. See Honig Indus. Diamond Wheel, Inc., ASBCA No. 46711, 94-2 BCA ¶ 26,955 (granting the government's motion to strike monetary claims that the contractor had not previously submitted to the contracting officer).

2. Seeking as a matter of right,<sup>11</sup> one of the following:

a. Payment of money in a sum certain;

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<sup>11</sup> Some submissions, such as cost proposals for work the government later decides it would like performed, would not be considered submissions seeking payment "as a matter of right." Reflectone v. Dalton, 60 F.3d 1572, n.7 (Fed. Cir. 1995)

b. Adjustment or interpretation of contract terms. TRW, Inc., ASBCA Nos. 51172 and 51530, 99-2 BCA ¶ 30,047 (seeking decision on allowability and allocability of certain costs). Compare William D. Euille & Assocs., Inc. v. General Services Administration, GSBGA No. 15,261, 2000 GSBGA LEXIS 105 (May 3, 2000) (dispute concerning directive to remove and replace building materials proper contract interpretation claim), with Rockhill Industries, Inc., ASBCA No. 51541, 00-1 BCA ¶ 30,693 (money claim "masquerading as claim for contract interpretation"); or

c. Other relief arising under or relating to the contract. See General Electric Co.; Bayport Constr. Co., ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958 (demand for contractor to replace or correct latent defects under Inspection clause).

(1) Reformation or Rescission. See McClure Electrical Constructors, Inc. v. United States, 132 F.3d 709 (Fed. Cir. 1997); LaBarge Products, Inc. v. West, 46 F.3d 1547 (Fed. Cir. 1995) (ASBCA had jurisdiction to entertain reformation claim).

(2) Specific performance is not an available remedy. Western Aviation Maintenance, Inc. v. General Services Administration, GSBGA No. 14165, 98-2 BCA ¶ 29,816.

3. Submitted to the contracting officer for a decision. 41 U.S.C. § 605(a).

a. The Federal Circuit has interpreted the CDA's submission language as requiring the contractor to "commit" the claim to the contracting officer and "yield" to his authority to make a final decision. Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991).

- b. The claim need not be sent only to the contracting officer, or directly to the contracting officer. If the contractor submits the claim to its primary government contact with a request for a contracting officer's final decision, and the primary contact delivers the claim to the contracting officer, the submission requirement can be met. Neal & Co. v. United States, 945 F.2d 385 (Fed. Cir. 1991) (claim requesting contracting officer's decision addressed to Resident Officer in Charge of Construction). See also D.L. Braughler Co., Inc. v. West, 127 F.3d 1476 (Fed. Cir. 1997) (submission to resident engineer not seeking contracting officer decision not a claim); J&E Salvage Co., 37 Fed. Cl. 256 (1997) (letter submitted to the Department of Justice rather than the Defense Reutilization and Marketing Office was not a claim).
- c. Only receipt by the contracting officer triggers the time limits and interest provisions set forth in the CDA. See 41 U.S.C. § 605(c)(1), § 611.
- d. A claim should implicitly or explicitly request a contracting officer's final decision. See Ellett Constr. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (holding that submission to the contracting officer is required, but the request for a final decision may be implied); Heyl & Patterson, Inc. v. O'Keefe, 986 F.2d 480, 483 (Fed. Cir. 1993) (stating that "a request for a final decision can be implied from the context of the submission"); Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992) (stating that no "magic words" are required "as long as what the contractor desires by its submissions is a final decision").
- e. A contracting officer can't issue a valid final decision if the contractor explicitly states that it is not seeking a final decision. Fisherman's Boat Shop, Inc. ASBCA No. 50324, 97-2 BCA ¶ 29,257 (holding that the contracting officer's final decision was a nullity because the contractor did not intend for its letter submission to be treated as a claim).

4. Certification. A contractor must certify any claim that exceeds \$100,000. 41 U.S.C. § 605(c)(1); FAR 33.207. CDA certification serves to create the deterrent of potential liability for fraud and thereby discourage contractors from submitting unwarranted or inflated claims. See Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759 (Fed. Cir. 1993).

a. Determining the Claim Amount.

- (1) A contractor must consider the aggregate effect of increased and decreased costs to determine whether the claim exceeds the dollar threshold for certification.<sup>12</sup> FAR 33.207(d).
- (2) Claims that are based on a "common or related set of operative facts" constitute one claim. Placeway Constr. Corp., 920 F.2d 903 (Fed. Cir. 1990).
- (3) A contractor may not split a single claim that exceeds \$100,000 into multiple claims to avoid the certification requirement. See, e.g., Walsky Constr. Co v. United States, 3 Ct. Cl. 615 (1983); Warchol Constr. Co. v. United States, 2 Cl. Ct. 384 (1983); D&K Painting Co., Inc., DOTCAB No. 4014, 98-2 BCA ¶ 30,064; Columbia Constr. Co., ASBCA No. 48536, 96-1 BCA ¶ 27,970; Jay Dee Militarywear, Inc., ASBCA No. 46539, 94-2 BCA ¶ 26,720.
- (4) Separate claims that total less than \$100,000 each require no certification, even if their combined total exceeds \$100,000. See Phillips Constr. Co., ASBCA No. 27055, 83-2 BCA ¶ 16,618; B. D. Click Co., ASBCA No. 25609, 81-2 BCA ¶ 15,394.
- (5) The contracting officer cannot consolidate separate claims to create a single claim that exceeds \$100,000. See B. D. Click Co., Inc., ASBCA No. 25609, 81-2 BCA ¶ 15,395. Courts and boards, however, can consolidate separate claims for hearing to promote judicial economy.

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<sup>12</sup> The contractor need not include the amount of any government claims in its calculations. J. Slotnik Co., VABCA No. 3468, 92-1 BCA ¶ 24,645.

- (6) A contractor need not certify a claim that grows to exceed \$100,000 after the contractor submits it to the contracting officer if:
- (a) The increase was based on information that was not reasonably available at the time of the initial submission; or
  - (b) The claim grew as the result of a regularly accruing charge and the passage of time. See Tecom, Inc. v. United States, 732 F.2d 935 (Fed. Cir. 1984) (concluding that the contractor need not certify a \$11,000 claim that grew to \$72,000 after the government exercised certain options); AAI Corp. v. United States, 22 Cl. Ct. 541 (1991) (refusing to dismiss a claim that was \$0 when submitted, but increased to \$500,000 by the time the suit came before the court); Mulunesh Berhe, ASBCA No. 49681, 96-2 BCA ¶ 28,339.

b. Certification Language Requirement. FAR 33.207(c). When required to do so, a contractor must certify that:

- (1) The claim is made in good faith;
- (2) The supporting data are accurate and complete to the best of the contractor's knowledge and belief;
- (3) The amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable; and
- (4) The person submitting the claim is duly authorized to certify the claim on the contractor's behalf.<sup>13</sup>

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<sup>13</sup> Absent extraordinary circumstances, courts and boards will not question the accuracy of the statements in a contractor's certification. D.E.W., Inc., ASBCA No. 37332, 94-3 BCA ¶ 27,004. A prime contractor need not agree

- c. Proper Certifying Official. A contractor may certify its claim through "any person duly authorized to bind the contractor with respect to the claim." 41 U.S.C. § 605(c)(7); FAR 33.207(e). See Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088 (concluding that senior project manager was proper certifying official).
- d. No claim vs. Defective Certification. Tribunals treat differently those cases where an attempted certification is "substantially" compliant from those where the certification is either entirely absent or the language is intentionally or negligently defective.

(1) No claim.

- (a) Absence of Certification. No valid claim exists. See FAR 33.201 ("Failure to certify shall not be deemed to be a defective certification."); Hamza v. United States, 31 Fed. Cl. 315 (1994) (complete lack of an attempted certification); Eurostyle Inc., ASBCA No. 45934, 94-1 BCA ¶ 26,458 ("complete absence of any certification is not a mere defect which may be corrected").
- (b) Certifications made with intentional, reckless, or negligent disregard of CDA certification requirements are not correctable. See Walashek Industrial & Marine, Inc., ASBCA No. 52166, 00-1 BCA ¶ 30,728 (two prongs of certificate omitted or not fairly compliant); Keydata Sys, Inc. v. Department of the Treasury, GSBCE No. 14281-TD, 97-2 BCA ¶ 29,330 (denying the contractor's petition for a final decision because it failed to correct substantial certification defects).

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with all aspects or elements of a subcontractor's claim. In addition, a prime contractor need not be certain of the government's liability, or the amount recoverable. The prime contractor need only believe that the subcontractor has good grounds to support its claim. See Oconto Elec., Inc., ASBCA No. 45856, 94-3 BCA ¶ 26,958 (holding that the prime contractor properly certified its subcontractor's claim, even though the official certifying the claim lacked personal knowledge of the amount claimed); see also Arnold M. Diamond, Inc. v. Dalton, 25 F.3d 1006 (Fed. Cir. 1994) (upholding the contractor's submission of a subcontractor's claim pursuant to a court order).

- (2) Claim with "Defective" Certification. 41 U.S.C. § 605 (c)(6). FAR 33.201 defines a defective certification as one which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person duly authorized to bind the contractor.
- (a) Exact recitation of the language of CDA section 605(c) is not required—"substantial compliance" suffices. See Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759 (Fed. Cir. 1993) (substituting the word "understanding" for "knowledge" did not render certificate defective).
- (b) Technical defects are correctable. Examples include missing certifications when two or more claims are deemed to be a larger claim requiring certification, and certification by the wrong representative of the contractor. See H.R. Rep. No. 102-1006, 102d Cong., 2d Sess. 28, reprinted in 1992 U.S.C.C.A. at 3921, 3937.
- (c) Certifications used for other purposes may be acceptable even though they do not include the language required by the CDA. See James M. Ellett Const. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (SF 1436 termination proposal not substantially deficient as a CDA certificate); Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088. Compare SAE/Americon - Mid-Atlantic, Inc., GSBCA No. 12294, 94-2 BCA ¶ 26,890 (holding that the contractor's "certificate of current cost or pricing data" on SF 1411 was susceptible of correction, even though it did not include the first and third statements required for a proper CDA certification), with Scan-Tech Security, L.P. v. United States, 46 Fed. Cl. 326 (2000) (suit dismissed after court equated use of SF 1411 with no certification).

- (d) The CO need not render a final decision if he notifies the contractor in writing of the defect within 60 days after receipt of the claim. 41 U.S.C. § 605 (c)(6).
- (e) Interest on a claim with a defective certification shall be paid from the date the contracting officer initially received the claim. FAR 33.208(c).
- (f) A defect will not deprive a court or board of jurisdiction, but it must be corrected before entry of a court's final judgment or a board's decision. 41 U.S.C. § 605 (c)(6).

D. Demand for a Sum Certain.

1. Where the essence of a dispute is the increased cost of performance, the contractor must demand a sum certain as a matter of right. Compare Essex Electro Eng'rs, Inc. v. United States, 22 Cl. Ct. 757, aff'd, 960 F.2d 1576 (Fed. Cir. 1992) (holding that a cost proposal for possible future work did not seek a sum certain as a matter of right); with J.S. Alberici Constr. Co., ENG BCA No. 6179, 97-1 BCA ¶ 28,639, recon. denied, ENG BCA No. 6179-R, 97-1 BCA ¶ 28,919 (holding that a request for costs associated with ongoing work, but not yet incurred, was a sum certain); McDonnell Douglas Corp., ASBCA No. 46582, 96-2 BCA ¶ 28,377 (holding that a sum certain can exist even if the contractor has not yet incurred any costs); Fairchild Indus., ASBCA No. 46197, 95-1 BCA ¶ 27,594 (holding that a request based on estimated future costs was a sum certain).
2. A claim states a sum certain if:
  - a. The government can determine the amount of the claim using a simple mathematical formula. Metric Constr. Co. v. United States, 1 Cl. Ct. 383 (1983); Mulunesh Berhe, ASBCA No. 49681, 96-2 BCA ¶ 28,339 (simple multiplication of requested monthly rate for lease); Jepco Petroleum, ASBCA No. 40480, 91-2 BCA ¶ 24,038 (claim requesting additional \$3 per linear foot of excavation, when multiplied by total of 10,000 feet, produced sum certain).



b. Enlarged claim doctrine. Under this doctrine, a BCA or the COFC may exercise jurisdiction over a dispute that involves a sum in excess of that presented to the contracting officer for a final decision if:

- (1) The increase in the amount of the claim is based on the same set of operative facts previously presented to the contracting officer; and
- (2) The contractor neither knew nor reasonably should have known, at the time when the claim was presented to the contracting officer, of the factors justifying an increase in the amount of the claim. Johnson Controls World Services, Inc. v. United States, 43 Fed. Cl. 589 (1999). See also Stencel Aero Engineering Corp., ASBCA No. 28654, 84-1 BCA ¶ 16,951 (finding essential character or elements of the certified claim had not been changed).

E. Supporting Data. Invoices, detailed cost breakdowns, and other supporting financial documentation need not accompany a CDA claim as a jurisdictional prerequisite. H.L. Smith v. Dalton, 49 F.3d 1563 (Fed. Cir. 1995) (contractor's failure to provide CO with additional information "simply delayed action on its claims"); John T. Jones Constr. Co., ASBCA No. 48303, 96-1 BCA ¶ 27,997 (stating that the contracting officer's desire for more information did not invalidate the contractor's claim submission).

F. Settlement.

1. Agencies should attempt to resolve claims by mutual agreement, if possible. FAR 33.204; FAR 33.210. See Pathman Constr. Co., Inc. v. United States, 817 F.2d 1573 (Fed. Cir. 1987) (stating that a "major purpose" of the CDA is to "induce resolution of contract disputes with the government by negotiation rather than litigation").

2. Only contracting officers or their authorized representatives may normally settle contract claims. See FAR 33.210; see also J.H. Strain & Sons, Inc., ASBCA No. 34432, 88-3 BCA ¶ 20,909 (refusing to enforce a settlement agreement that the agency's attorney entered into without authority). The Department of Justice (DOJ), however, has plenary authority to settle cases pending before the COFC. See Executive Business Media v. Department of Defense, 3 F.3d 759 (4th Cir. 1993).
3. Contracting officers are authorized, within the limits of their warrants, to decide or resolve all claims arising under or relating to the contract except for:
  - a. A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or
  - b. The settlement, compromise, payment or adjustment of any claim involving fraud.<sup>14</sup> FAR 33.210.

G. Interest.

1. Interest on CDA claims is calculated every six months based on a rate established by the Secretary of the Treasury pursuant to Pub. L. No. 92-41, 85 Stat. 97. 41 U.S.C. § 611; FAR 33.208.
2. The Commerce Clearing House (CCH) Government Contracts Reporter (Vol. 4) lists interest rates from 1971 to the present.

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<sup>14</sup> When a claim is suspected to be fraudulent, the contracting officer shall refer the matter to the agency official responsible for investigating fraud. FAR 33.209. To justify a stay in a Board proceeding, the movant has the burden to show there are substantially similar issues, facts and witnesses in civil and criminal proceedings, and there is a need to protect the criminal litigation which overrides any injury to the parties by staying the civil litigation. Afro-Lecon, Inc. v. United States, 820 F.2d 1198 (Fed. Cir. 1987); T. Iida Contracting, Ltd., ASBCA No. 51865, 00-1 BCA ¶ 30,626.

3. Interest may begin to accrue on costs before the contractor incurs them. See Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991) (stating that 41 U.S.C. § 611 “sets a single, red-letter date for the interest of all amounts found due by a court without regard to when the contractor incurred the costs”); see also Caldera v. J.S. Alberici Constr. Co., 153 F.3d 1381 (Fed Cir. 1998) (holding that 41 U.S.C. § 611 “trumps” conflicting regulations that prohibit claims for future costs).

H. Termination for Convenience (T4C) Settlement Proposals. FAR 49.206.

1. A contractor may submit a settlement proposal for costs associated with the termination of a contract for the convenience of the government. FAR 49.206-1; FAR 49.602-1. See Standard Form (SF) 1435, Settlement Proposal (Inventory Basis); SF 1436, Settlement Proposal (Total Cost Basis); SF 1437, Settlement Proposal for Cost-Reimbursement Type Contracts; SF 1438, Settlement Proposal (Short Form).
2. Courts and boards consider T4C settlement proposals to be “nonroutine” submissions under the CDA. See Ellett, 93 F.3d at 1542 (stating that “it is difficult to conceive of a less routine demand for payment than one which is submitted when the government terminates a contract for its convenience”).
  - a. Courts and boards, however, do not consider T4C settlement proposals to be CDA claims when submitted because contractors normally do not submit them for a contracting officer’s final decision—they submit them to facilitate negotiations. See Ellett Constr. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (T4C settlement proposal was not a claim because the contractor did not submit it to the contracting officer for a final decision); see also Walsky Constr. Co. v. United States, 173 F.3d 1312 (Fed. Cir. 1999) (T4C settlement proposal was not a claim because it had not yet been the subject of negotiations with the government); cf. Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 551 (1999) (parties may reach an impasse without entering into negotiations if allegations of fraud prevent the contracting officer from entering into negotiations).

- b. A T4C settlement proposal may “ripen” into a CDA claim once settlement negotiations reach an impasse. See Ellett, 93 F.3d at 1544 (holding that the contractor’s request for a final decision following ten months of “fruitless negotiations” converted its T4C settlement proposal into a claim); Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088 (holding that a contractor’s T4C settlement proposal ripened into a claim when the contracting officer issued a unilateral contract modification following the parties’ unsuccessful negotiations); cf. FAR 49.109-7(f) (stating that a contractor may appeal a “settlement by determination” under the Disputes clause unless the contractor failed to submit its T4C settlement proposal in a timely manner).
3. Certification. If a CDA certification is required, the contractor may rely on the standard certification in whichever SF the FAR requires it to submit. See Ellett, 93 F.3d at 1545 (rejecting the government’s argument that proper certification of a T4C settlement proposal is a jurisdictional prerequisite); see also Metric Constructors, Inc., supra. (concluding that the contractor could “correct” the SF 1436 certification to comply with the CDA certification requirements).
4. Interest. The FAR precludes the government from paying interest under a settlement agreement or determination; however, the FAR permits the government to pay interest on a contractor’s successful appeal. FAR 49.112-2(d). Therefore, the government cannot pay interest on a T4C settlement proposal unless it “ripens” into a CDA claim and the contractor successfully appeals to the ASBCA or the COFC. See Ellett, 93 F.3d at 1545 (recognizing the fact that T4C settlement proposals are treated disparately for interest purposes); see also Central Envtl. Inc., ASBCA 51086, 98-2 BCA ¶ 29,912 (concluding that interest did not begin to run until after the parties’ reached an impasse and the contractor requested a contracting officer’s final decision).

I. Statute of Limitations.

1. In 1987, the Federal Circuit concluded that the six-year statute of limitations in the Tucker Act does not apply to CDA appeals. Pathman Constr. Co. v. United States, 817 F.2d 1573 (Fed. Cir. 1987).

2. In 1994, Congress revised the CDA to impose a six-year statute of limitations. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified at 40 U.S.C. § 605). See FAR 33.206; see also Motorola, Inc. v. West, 125 F.3d 1470 (Fed. Cir. 1997).
  - a. For contracts awarded on or after 1 October 1995, a contractor must submit its claim within six years of the date the claim accrues.
  - b. This statute of limitations provision does not apply to government claims based on contractor claims involving fraud.

## V. GOVERNMENT CLAIMS.

- A. Requirement for Final Decision. 41 U.S.C. § 605(a); FAR 52.233-1(d)(1).
  1. The government may assert a claim against a contractor; however, the claim must be the subject of a contracting officer's final decision.
  2. Some government actions are immediately appealable.
    - a. Termination for Default. A contracting officer's decision to terminate a contract for default is an immediately appealable government claim. Independent Mfg. & Serv. Cos. of Am., Inc., ASBCA No. 47636, 94-3 BCA ¶ 27,223. See Malone v. United States, 849 F.2d 1441, 1443 (Fed. Cir. 1988); cf. Educators Assoc., Inc. v. United States, 41 Fed. Cl. 811 (1998) (dismissing the contractor's suit as untimely because the contractor failed to appeal within 12 months of the date it received the final termination decision).
    - b. Withholding Monies. A contracting officer's decision to withhold monies otherwise due the contractor is an immediately appealable government claim. Placeway Constr. Corp. United States, 920 F.2d 903, 906 (Fed. Cir. 1990); Sprint Communications Co., L.P. v. General Servs. Admin., GSBICA No. 14263, 97-2 BCA ¶ 29,249.

- c. Cost Accounting Standards (CAS) Determination. A contracting officer's decision regarding the allowability of costs under the CAS is often an immediately appealable government claim. See Newport News Shipbuilding and Dry Dock Co. v. United States, 44 Fed. Cl. 613 (1999) (government's demand that the contractor change its accounting for all of its CAS-covered contracts was an appealable final decision); Litton Sys., Inc., ASBCA No. 45400, 94-2 BCA ¶ 26,895 (holding that the government's determination was an appealable government claim because the government was "seeking, as a matter of right, the adjustment or interpretation of contract terms"); cf. Aydin Corp., ASBCA No. 50301, 97-2 BCA ¶ 29,259 (holding that the contracting officer's failure to present a claim arising under CAS was a nonjurisdictional error).
  - d. Miscellaneous Demands. See Bean Horizon-Weeks (JV), ENG BCA No. 6398, 99-1 BCA ¶ 30,134 (holding that a post-appeal letter demanding repayment for improper work was an appealable final decision); Outdoor Venture Corp., ASBCA No. 49756, 96-2 BCA ¶ 28,490 (holding that the government's demand for warranty work was a claim that the contractor could immediately appeal); Sprint Communications Co. v. General Servs. Admin., GSBCA No. 13182, 96-1 BCA ¶ 28,068. But see Boeing Co., 25 Cl. Ct. 441 (1992) (holding that a post-termination letter demanding the return of unliquidated progress payments was not appealable); Iowa-Illinois Cleaning Co. v. General Servs. Admin., GSBCA No. 12595, 95-2 BCA ¶ 27,628 (holding that government deductions for deficient performance are not appealable absent a contracting officer's final decision).
3. As a general rule, the government may not assert a counterclaim that has not been the subject of a contracting officer's final decision.

- B. Contractor Notice. Assertion of a government claim is usually a two-step process. A demand letter gives the contractor notice of the potential claim and an opportunity to respond. If warranted, the final decision follows. See FAR 33.211(a) ("When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary"); Instruments & Controls Serv. Co., ASBCA No. 38332, 89-3 BCA ¶ 22,237 (dismissing appeal because final decision not preceded by demand); see also Bean Horizon-Weeks (JV), ENG BCA No. 6398, 99-1 BCA ¶ 30,134; B.L.I. Constr. Co., ASBCA No. 40857, 92-2 BCA ¶ 24,963 (stating that "[w]hen the Government is considering action, the contractor should be given an opportunity to state its position, express its views, or explain, argue against, or contest the proposed action").
- C. Certification. Neither party is required to certify a government claim. 41 U.S.C. §§ 605(a); 605(c)(1). See Placeway Constr. Corp., 920 F.2d at 906; Charles W. Ware, GSBCA No. 10126, 90-2 BCA ¶ 22,871. A contractor, however, must certify its request for interest on monies deducted or withheld by the government. General Motors Corp., ASBCA No. 35634, 92-3 BCA ¶ 25,149.
- D. Interest. Interest on a government claim begins to run when the contractor receives the government's initial written demand for payment. FAR 52.232-17.
- E. Finality. Once the contracting officer's decision becomes final (i.e., once the appeal period has passed), the contractor cannot challenge the merits of that decision judicially. 41 U.S.C. § 605(a). See Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1562 (Fed. Cir. 1990); L.A. Constr., Inc., 95-1 BCA ¶ 27,291 (holding that the contractor's failure to appeal the final decision in a timely manner deprived the board of jurisdiction, even though both parties testified on the merits during the hearing).

## VI. FINAL DECISIONS.

- A. General. The contracting officer must issue a written final decision on all claims. 51 U.S.C. § 605(a); FAR 33.206; FAR 33.211(a). See Tyger Constr. Co., ASBCA No. 36100, 88-3 BCA ¶ 21,149. But cf. McDonnell Douglas Corp., ASBCA No. 44637, 93-2 BCA ¶ 25,700 (dismissing the contractor's appeal from a government claim for noncompliance with CAS because the procuring contracting officer issued the final decision instead of the cognizant administrative contracting officer as required by the FAR and DFARS).

B. Time Limits. A contracting officer must issue a final decision on a contractor's claim within certain statutory time limits. 41 U.S.C. § 605(c); FAR 33.211.

1. Claims of \$100,000 or less. The contracting officer must issue a final decision within 60 days.
2. Certified Claims Exceeding \$100,000. The contracting officer must take one of the following actions within 60 days:
  - a. Issue a final decision; or
  - b. Notify the contractor of a firm date by which the contracting officer will issue a final decision.<sup>15</sup> See Boeing Co. v. United States, 26 Cl. Ct. 257 (1992); Aerojet Gen. Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470 (concluding that the contracting officer failed to provide a firm date where the contracting officer made the timely issuance of a final decision contingent on the contractor's cooperation in providing additional information); Inter-Con Security Sys., Inc., ASBCA No. 45749, 93-3 BCA ¶ 26,062 (concluding that the contracting officer failed to provide a firm date where the contracting officer merely promised to render a final decision within 60 days of receiving the audit).
3. Uncertified and Defectively Certified Claims Exceeding \$100,000.
  - a. The contracting officer has no obligation to issue a final decision on a claim that exceeds \$100,000 if the claim is:
    - (1) Uncertified; or
    - (2) Defectively certified.

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<sup>15</sup> The contracting officer must issue the final decision within a reasonable period. What constitutes a "reasonable" period depends on the size and complexity of the claim, the adequacy of the contractor's supporting data, and other relevant factors. 41 U.S.C. § 605(c)(3); FAR 33.211(d). See Defense Sys. Co., ASBCA No. 50534, 97-2 BCA ¶ 28,981 (holding that nine months to review a \$72 million claim was reasonable).



- b. If the claim is defectively certified, the contracting officer must notify the contractor, in writing, within 60 days of the date the contracting officer received the claim of the reason(s) why any attempted certification was defective.

4. Failure to Issue a Final Decision.

- a. If the contracting officer fails to issue a final decision within a reasonable period of time, the contractor can:

- (1) Request the tribunal concerned to direct the contracting officer to issue a final decision. 41 U.S.C. § 605(c)(4); FAR 33.211(f). See American Industries, ASBCA No. 26930-15, 82-1 BCA ¶ 15,753.

- (2) Treat the contracting officer's failure to issue a final decision as an appealable final decision (i.e., a "deemed denial"). 41 U.S.C. § 605(c)(5); FAR 33.211(g). See Aerojet Gen. Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470.

- b. A BCA, however, cannot direct the contracting officer to issue a more detailed final decision than the contracting officer has already issued. A.D. Roe Co., ASBCA No. 26078, 81-2 BCA ¶ 15,231.

C. Format. 41 U.S.C. § 605(a); FAR 33.211(a)(4).

- 1. The final decision must be written. Tyger Constr. Co., ASBCA No. 36100, 88-3 BCA ¶ 21,149.

- 2. In addition, the final decision must:

- a. Describe the claim or dispute;
  - b. Refer to the pertinent or disputed contract terms;
  - c. State the disputed and undisputed facts;

- d. State the decision and explain the contracting officer's rationale;
- e. Advise the contractor of its appeal rights; and
- f. Demand the repayment of any indebtedness to the government.

3. Rights Advisement.

- a. FAR 33.211(a)(4)(v) specifies that the final decision should include a paragraph substantially as follows:

This is a final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of \$50,000 or less or its accelerated procedure for claims of \$100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision.

- b. Failure to properly advise the contractor of its appeal rights may prevent the "appeals clock" from starting. If the contracting officer's rights advisory is deficient, the contractor must demonstrate that, but for its detrimental reliance upon the faulty advice, its appeal would have been timely. Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996).

- 4. Specific findings of fact are not required and, if made, are not binding on the government in any subsequent proceedings. See Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (concluding that admissions favorable to the contractor do not constitute evidence of government liability).

D. Delivery. 41 U.S.C. § 605(a); FAR 33.211(b).

1. The contracting officer must mail (or otherwise furnish) a copy of the final decision to the contractor. See Images II, Inc., ASBCA No. 47943, 94-3 BCA ¶ 27,277 (holding that receipt by the contractor's employee constituted proper notice).
2. The contracting officer should use certified mail, return receipt requested; however, hand delivery and facsimile (FAX) transmission are also acceptable means of delivery.
3. The contracting officer should preserve all evidence of the date the contractor received the contracting officer's final decision. See Omni Abstract, Inc., ENG BCA No. 6254, 96-2 BCA ¶ 28,367 (relying on a government attorney's affidavit to determine when the 90-day appeals period started).
  - a. When hand delivering the final decision, the contracting officer should require the contractor to sign for the document.
  - b. When using a FAX transmission, the contracting officer should confirm receipt and memorialize the confirmation in a written memorandum. See Mid-Eastern Indus., Inc., ASBCA No. 51287, 98-2 BCA ¶ 29,907 (concluding that the government established a prima facie case by presenting evidence to show that it successfully transmitted the final decision to the contractor's FAX number); see also Public Service Cellular, Inc., ASBCA No. 52489, 00-1 BCA ¶ 30,832 (transmission report not sufficient evidence of receipt).

E. Independent Act of a Contracting Officer.

1. The final decision must be the contracting officer's personal, independent act. Compare PLB Grain Storage Corp. v. Glickman, 113 F.3d 1257 (Fed. Cir. 1997) (unpub.) (holding that a termination was proper even though a committee of officials directed it); with Climatic Rainwear Co. v. United States, 88 F. Supp. 415 (Ct. Cl. 1950) (holding that a termination was improper because the contracting officer's attorney prepared the termination findings without the contracting officer's participation).

2. The contracting officer should seek assistance from engineers, attorneys, auditors, and other advisors. See FAR 1.602-2 (requiring the contracting officer to request and consider the advice of "specialists," as appropriate); FAR 33.211(a)(2) (requiring the contracting officer to seek assistance from "legal and other advisors"); see also Pacific Architects & Eng'rs, Inc. v. United States, 203 Ct. Cl. 499, 517 (1974) (opining that it is unreasonable to preclude the contracting officer from seeking legal advice); Prism Constr. Co., ASBCA No. 44682, 97-1 BCA ¶ 28,909 (indicating that the contracting officer is not required to independently investigate the facts of a claim before issuing final decision); Environmental Devices, Inc., ASBCA No. 37430, 93-3 BCA ¶ 26,138 (approving the contracting officer's communications with the user agency prior to terminating the contract for default); cf. AR 27-1, para. 15-5a (noting the "particular importance" of the contracts attorney's role in advising the contracting officer on the drafting of a final decision).

F. Finality. 41 U.S.C. § 605(b).

1. A final decision is binding and conclusive unless timely appealed.
2. Reconsideration.
  - a. A contracting officer may reconsider, withdraw, or rescind a final decision before the expiration of the appeals period. General Dynamics Corp., ASBCA No. 39866, 91-2 BCA ¶ 24,017. Cf. Daniels & Shanklin Constr. Co., ASBCA No. 37102, 89-3 BCA ¶ 22,060 (rejecting the contractor's assertion that the contracting officer could not withdraw a final decision granting its claim, and indicating that the contracting officer has an obligation to do so if the final decision is erroneous).
  - b. The contracting officer's rescission of a final decision, however, will not necessarily deprive a BCA of jurisdiction because jurisdiction vests as soon as the contractor files its appeal. See Security Servs., Inc., GSBCEA No. 11052, 92-1 BCA ¶ 24,704; cf. McDonnell Douglas Astronautics Co., ASBCA No. 36770, 89-3 BCA ¶ 22,253 (indicating that the board would sustain a contractor's appeal if the contracting officer withdrew the final decision after the contractor filed its appeal).

- c. A contracting officer may vacate his or her final decision unintentionally by agreeing to meet with the contractor to discuss the matters in dispute. See Sach Sinha and Assocs., ASBCA No. 46916, 95-1 BCA ¶ 27,499 (finding that the contracting officer “reconsidered” her final decision after she met with the contractor as a matter of “business courtesy” and requested the contractor to submit its proposed settlement alternatives in writing); Royal Int’l Builders Co., ASBCA No. 42637, 92-1 BCA ¶ 24,684 (holding that the contracting officer “destroyed the finality of his initial decision” by agreeing to meet with the contractor, even though the meeting was cancelled and the contracting officer subsequently sent the contractor a letter stating his intent to stand by his original decision).
  - d. To restart the appeal period after reconsidering a final decision, the contracting officer must issue a new final decision. Information Sys. & Networks Corp. v. United States, 17 Cl. Ct. 527 (1989); Sach Sinha and Assocs., ASBCA No. 46916, 95-1 BCA ¶ 27,499; Birken Mfg. Co., ASBCA No. 36587, 89-2 BCA ¶ 21,581.
3. The Fulford Doctrine. A contractor may dispute an underlying default termination as part of a timely appeal from a government demand for excess reprocurement costs, even though the contractor failed to appeal the underlying default termination in a timely manner. Fulford Mfg. Co., ASBCA No. 2143, 6 CCF ¶ 61,815 (May 20, 1955). See D. Moody & Co. v. United States, 5 Cl. Ct. 70 (1984); Kellner Equip., Inc., ASBCA No. 26006, 82-2 BCA ¶ 16,077.

## **VII. APPEALS TO THE ARMED SERVICES BOARD OF CONTRACT APPEALS (ASBCA).**

- A. The Right to Appeal. 41 U.S.C. § 606. A contractor may appeal a contracting officer’s final decision to an agency BCA.
- B. The Armed Services Board of Contract Appeals (ASBCA).

1. The ASBCA consists of 25-30 administrative judges who dispose of approximately 800-900 appeals per year.<sup>16</sup>
  2. ASBCA judges specialize in contract disputes and come from both the government and private sectors. Each judge has at least five years of experience working in the field of government contract law.
  3. The Rules of the Armed Services Board of Contract Appeals appear in Appendix A of the DFARS.
- C. Jurisdiction. 41 U.S.C. § 607(d). The ASBCA has jurisdiction to decide appeals regarding contracts made by:
1. The Department of Defense; or
  2. An agency that has designated the ASBCA to decide the appeal.
- D. Standard of Review. The ASBCA will review the appeal de novo. See 41 U.S.C. § 605(a) (indicating that the contracting officer's specific findings of fact are not binding in any subsequently proceedings); see also Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (en banc); Precision Specialties, Inc., ASBCA No. 48717, 96-1 BCA ¶ 28,054 (final decision retains no presumptive evidentiary weight nor is it binding on the Board).

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<sup>16</sup> Due to the merging of the Engineer Board of Contract Appeals with the ASBCA, for the first time in several years the total number of cases docketed at the ASBCA increased. 42 GOV'T CONTRACTOR, No. 42, at 4 (Nov. 8, 2000). The number of docketed cases for FY 2000 increased from 663 in FY 1999 to 722. The board disposed of 857 appeals this fiscal year, dismissing 509, denying 81, and sustaining 186. *Id.*

E. Perfecting an Appeal.

1. Requirement. A contractor's notice of appeal (NOA) shall be mailed or otherwise furnished to the Board within 90 days from date of receipt of the final decision. A copy shall be furnished to the contracting officer. 41 U.S.C. § 606; ASBCA Rule 1(a). See Cosmic Constr. Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982) (90 day filing requirement is statutory and cannot be waived by the Board); Rex Sys, Inc., ASBCA No. 50456, 98-2 BCA ¶ 29,956 (refusing to dismiss a contractor's appeal simply because the contractor failed to send a copy of the NOA to the contracting officer).
2. Filing an appeal with the contracting officer can satisfy the Board's notice requirement. See Hellenic Express, ASBCA No. 47129, 94-3 BCA ¶ 27,189 (citing Yankee Telecomm. Lab., ASBCA No. 25240, 82-2 BCA ¶ 15,515, for the proposition that "filing an appeal with the contracting officer is tantamount to filing with the Board"); cf. Brunner Bau GmbH, ASBCA No. 35678, 89-1 BCA ¶ 21,315 (holding that notice to the government counsel was a filing).
3. Methods of filing.
  - a. Mail. The written NOA can be sent to the ASBCA or to the contracting officer via the U.S. Postal Service. See Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (NOA mailed to KO timely filed).
  - b. Otherwise furnishing, such as through commercial courier service. North Coast Remfg., Inc., ASBCA No. 38599, 89-3 BCA ¶ 22,232 (NOA delivered by Federal Express courier service not accorded same status as U.S. mail service and was therefore untimely).
4. Contents. An adequate notice of appeal must:
  - a. Be in writing. See Lows Enter., ASBCA No. 51585, 00-1 BCA ¶ 30,622 (holding that verbal notice is insufficient).
  - b. Express dissatisfaction with the contracting officer's decision;

- c. Manifest an intent to appeal the decision to a higher authority, see e.g., McNamara-Lunz Vans & Warehouse, Inc., ASBCA No. 38057, 89-2 BCA ¶ 21,636 (concluding that a letter stating that “we will appeal your decision through the various avenues open to us” adequately expressed the contractor’s intent to appeal); cf. Stewart-Thomas Indus., Inc., ASBCA No. 38773, 90-1 BCA ¶ 22,481 (stating that the intent to appeal to the board must be unequivocal); Birken Mfg. Co., ASBCA No. 37064, 89-1 BCA ¶ 21,248 (concluding that an electronic message to the termination contracting officer did not express a clear intent to appeal); and
- d. Be timely. 41 U.S.C. § 606; ASBCA Rule 1(a); Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232.
  - (1) A contractor must file an appeal with a BCA within 90 days of the date it received the contracting officer’s final decision. 41 U.S.C. § 606.
  - (2) In computing the time taken to appeal (See ASBCA Rule 33(b)):
    - (a) Exclude the day the contractor received the contracting officer’s final decision; and
    - (b) Count the day the contractor mailed (evidenced by postmark by U.S. Postal Service) the NOA or that the Board received the NOA.
    - (c) If the 90th day is a Saturday, Sunday, or legal holiday, the appeals period shall run to the end of the next business day.
- e. The NOA should also:
  - (1) Identify the contract, the department or agency involved in the dispute, the decision from which the contractor is appealing, and the amount in dispute; and



- (2) Be signed by the contractor taking the appeal or the contractor's duly authorized representative or attorney.

5. The Board liberally construes appeal notices. See Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (Board jurisdiction where timely mailing of NOA to KO, despite Board rejecting its NOA mailing).

F. Regular Appeals.

1. Docketing. ASBCA Rule 3. The Recorder assigns a docket number and notifies the parties in writing.
2. Rule 4 (R4) File. ASBCA Rule 4.
  - a. The contracting officer must assemble and transmit an appeal file to the ASBCA and the appellant within 30 days of the date the government receives the docketing notice.
  - b. The R4 file should contain the relevant documents (e.g., the final decision, the contract, and the pertinent correspondence).
  - c. The appellant may supplement the R4 file within 30 days of the date it receives its copy.<sup>17</sup>
3. Complaint. ASBCA Rule 6(a).
  - a. The appellant must file a complaint within 30 days of the date it receives the docketing notice. But cf. Northrop Grumman Corp., DOT BCA No. 4041, 99-1 BCA ¶ 30,191 (requiring the government to file the complaint on a government claim).
  - b. The board does not require a particular format; however, the complaint should set forth:

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<sup>17</sup> As a practical matter, the ASBCA generally allows either party to supplement the R4 file up to the date of the hearing.

- (1) Simple, concise, and direct statements of the appellant's claims;
  - (2) The basis of each claim; and
  - (3) The amount of each claim, if known.
- c. If sufficiently detailed, the board may treat the NOA as the complaint.
4. Answer. ASBCA Rule 6(b).
  - a. The government must answer the complaint within 30 days of the date it receives the complaint.
  - b. The answer should set forth simple, concise, and direct statements of the government's defenses to each of the appellant's claims, including any affirmative defenses.
  - c. The board will enter a general denial on the government's behalf if the government fails to file its answer in a timely manner.
5. Discovery. ASBCA Rules 14-15.
  - a. The parties may begin discovery as soon as the appellant files the complaint.
  - b. The board encourages the parties to engage in voluntary discovery.
  - c. Discovery may include depositions, interrogatories, requests for the production of documents, and requests for admission.
6. Pre-Hearing Conferences. ASBCA Rule 10. The board may hold telephonic pre-hearing conferences to discuss matters that will facilitate the processing and disposition of the appeal.

7. Motions. ASBCA Rule 5.
  - a. Parties must file jurisdictional motions promptly; however, the board may defer its ruling until the hearing.
  - b. Parties may also file appropriate non-jurisdictional motions.
8. Record Submissions. ASBCA Rule 11.
  - a. Either party may waive its right to a hearing and submit its case on the written record.
  - b. The parties may supplement the record with affidavits, depositions, admissions, and stipulations when they choose to submit their case on the written record. See Solar Foam Insulation, ASBCA No. 46921, 94-2 BCA ¶ 26,901.
9. Hearings. ASBCA Rules 17-25.
  - a. The board will schedule the hearing and choose the location.
  - b. Hearings are relatively informal; however, the board generally adheres to the Federal Rules of Evidence.
  - c. Both parties may offer evidence in the form of testimony and exhibits.
  - d. Witnesses generally testify under oath and are subject to cross-examination.
  - e. The board may subpoena witnesses and documents.
  - f. A court reporter will prepare a verbatim transcript of the proceedings.

10. Briefs. ASBCA Rule 23. The parties may file post-hearing briefs after they receive the transcript and/or the record is closed.
11. Decisions. ASBCA Rule 28.
  - a. The ASBCA issues written decisions.
  - b. The presiding judge normally drafts the decision; however, three judges decide the case.
12. Motions for Reconsideration. ASBCA Rule 29.
  - a. Either party may file a motion for reconsideration within 30 days of the date it receives the board's decision.
  - b. Motions filed after 30 days are untimely. Bio-temp Scientific, Inc., ASBCA No. 41388, 95-2 BCA ¶ 86,242; Arctic Corner, Inc., ASBCA No. 33347, 92-2 BCA ¶ 24,874.
  - c. Absent unusual circumstances, a party may not use a motion for reconsideration to correct errors in its initial presentation. Metric Constructors, Inc., ASBCA No. 46279, 94-2 BCA ¶ 26,827.
13. Appeals. 41 U.S.C. § 607(g)(1). Either party may appeal to the Court of Appeals for the Federal Circuit (CAFC) within 120 days of the date it receives the board's decision; however, the government needs the consent of the U.S. Attorney General. 41 U.S.C. § 607(g)(1)(B).

G. Accelerated Appeals. 41 U.S.C. § 607(f); ASBCA Rule 12.3.

1. If the amount in dispute is \$100,000 or less, the contractor may choose to proceed under the board's accelerated procedures.
2. The board renders its decision, whenever possible, within 180 days from the date it receives the contractor's election; therefore, the board encourages the parties to limit (or waive) pleadings, discovery, and briefs.

3. The presiding judge normally issues the decision with the concurrence of a vice chairman. If these two individuals disagree, the chairman will cast the deciding vote.
  - a. Written decisions normally contain only summary findings of fact and conclusions.
  - b. If the parties agree, the presiding judge may issue an oral decision at the hearing and follow-up with a memorandum to formalize the decision.
4. Either party may appeal to the CAFC within 120 days of the date it receives the decision.

H. Expedited Appeals. 41 U.S.C. § 608; ASBCA Rule 12.2.

1. If the amount in dispute is \$50,000 or less, the contractor may choose to proceed under the board's expedited procedures.
2. The board renders its decision, whenever possible, within 120 days from the date it receives the contractor's election; therefore, the board uses very streamlined procedures (e.g., accelerated pleadings, extremely limited discovery, etc.).
3. The presiding judge decides the appeal.
  - a. Written decisions contain only summary finds of fact and conclusions.
  - b. The presiding judge may issue an oral decision from the bench and follow-up with a memorandum to formalize the decision.
4. Neither party may appeal the decision, and the decision has no precedential value. See Palmer v. Barram, 184 F.3d 1373 (Fed. Cir. 1999) (holding that a small claims decision is only appealable for fraud in the proceedings).

I. Remedies.

1. The board may grant any relief available to a litigant asserting a contract claim in the COFC. 41 U.S.C. § 607(d).
  - a. Money damages is the principal remedy sought.
  - b. The board may issue a declaratory judgment. See Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988) (validity of T4D).
  - c. The board may award attorney's fees pursuant to the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504. See Hughes Moving & Storage, Inc., ASBCA No. 45346, 00-1 BCA ¶ 30,776 (award decision in T4D case); Oneida Constr., Inc., ASBCA No. 44194, 95-2 BCA ¶ 27,893 (holding that the contractor's rejection of the agency settlement offer, which was more than the amount the board subsequently awarded, did not preclude recovery under the EAJA); cf. Cape Tool & Die, Inc., ASBCA No. 46433, 95-1 BCA ¶ 27,465 (finding rates in excess of the \$75 per hour guideline rate reasonable for attorneys in the Washington D.C. area with government contracts expertise). Q.R. Sys. North, Inc., ASBCA No. 39618, 96-1 BCA ¶ 27,943 (rejecting the contractor's attempt to transfer corporate assets so as to fall within the EAJA ceiling).
2. The board need not find a remedy-granting clause to grant relief. See S&W Tire Serv., Inc., GSBCA No. 6376, 82-2 BCA ¶ 16,048 (awarding anticipatory profits).
3. The board may not grant specific performance or injunctive relief. General Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195. See Western Aviation Maint., Inc. v. General Services Admin., GSBCA No. 14165, 98-2 BCA ¶ 29,816 (holding that the 1992 Tucker Act amendments did not waive the government's immunity from specific performance suits).

J. Payment of Judgments. 41 U.S.C. § 612.

1. An agency may access the “Judgment Fund” to pay “[a]ny judgment against the United States on a [CDA] claim.” 41 U.S.C. § 612(a). See 31 U.S.C. § 1304; cf. 28 U.S.C. § 2517.
  - a. The Judgment Fund is only available to pay judgments and monetary awards—it is not available to pay informal settlement agreements. See 41 U.S.C. § 612(a)(b); see also 31 U.S.C. § 1304.
  - b. If an agency lacks sufficient funds to cover an informal settlement agreement, it can “consent” to the entry of a judgment against it. See Bath Irons Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994); Casson Constr. Co., GSBICA No. 7276, 84-1 BCA ¶ 17,010 (1983). As a matter of policy, however, it behooves the buying activity to coordinate with its higher headquarters regarding the use of consent decrees since the agency must reimburse the Judgment Fund with current funds.
2. Prior to payment, both parties must certify that the judgment is “final” (i.e., that the parties will pursue no further review). 31 U.S.C. § 1304(a). See Inland Servs. Corp., B-199470, 60 Comp. Gen. 573 (1981).
3. An agency must repay the Judgment Fund from appropriations current at the time of the award or judgment. 41 U.S.C. § 612(c). Bureau of Land Management, B-211229, 63 Comp. Gen. 308 (1984).

- K. Appealing an Adverse Decision. 41 U.S.C. § 607(g)(1). Board decisions are final unless one of the parties appeals to the CAFC within 120 days after the date the party receives the board’s decision. See Placeway Constr. Corp. v. United States, 713 F.2d 726 (Fed. Cir. 1983).

## VIII. ACTIONS BEFORE THE COURT OF FEDERAL CLAIMS (COFC).

- A. The right to file suit. Subsequent to receipt of a contracting officer’s final decision, a contractor may bring an action directly on the claim in the COFC. 41 U.S.C. § 609(a)(1).

B. The Court of Federal Claims (COFC).

1. Over a third of the court's workload concerns contract claims.
2. The President appoints COFC judges for a 15-year term with the advice and consent of the Senate.
3. The President can reappoint a judge after the initial 15-year term expires.
4. The Federal Circuit can remove a judge for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.
5. The Rules of the United States Court of Federal Claims (RCFC) appear in an appendix to Title 28 of the United States Code.

C. Jurisdiction.

1. The Tucker Act. 28 U.S.C. § 1491(a)(1). The COFC has jurisdiction to decide claims against the United States based on:
  - a. The Constitution;
  - b. An act of Congress;
  - c. An executive regulation; or
  - d. An express or implied-in-fact contract.
2. The Contract Disputes Act (CDA) of 1978. 41 U.S.C. § 609. The Court has jurisdiction to decide appeals from contracting officers' final decisions.



3. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 28 U.S.C. § 1491(a)(2)). The COFC has jurisdiction to decide nonmonetary claims (e.g., disputes regarding contract terminations, rights in tangible or intangible property, and compliance with cost accounting standards) that arise under section 10(a)(1) of the CDA.
- D. Standard of Review. 41 U.S.C. § 609(a)(3). The COFC will review the case de novo. The COFC will not presume that the contracting officer's findings of fact and conclusions of law are valid. Instead, the COFC will treat the contracting officer's final decision as one more piece of documentary evidence and weigh it with all of the other evidence in the record. Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (en banc) (overruling previous case law that a contracting officer's final decision constitutes a "strong presumption or an evidentiary admission" of the government's liability).
- E. Perfecting an Appeal.
1. Timeliness. 41 U.S.C. § 609(a); RCFCs 3 and 6.
    - a. A contractor must file its complaint within 12 months of the date it received the contracting officer's final decision. See Janicki Logging Co. v. United States, 124 F.3d 226 (Fed. Cir. 1997) (unpub.); K&S Constr. v. United States, 35 Fed. Cl. 270 (1996); see also White Buffalo Constr., Inc. v. United States, 28 Fed. Cl. 145 (1992) (filing one day after the expiration of the 12 month period rendered it untimely).
    - b. In computing the appeals period, exclude:
      - (1) The day the contractor received the contracting officer's decision; and

(2) The last day of the appeals period if that day is:

- (a) A Saturday, Sunday, or federal holiday; or
- (b) A day on which weather or other conditions made the Clerk of Court's office inaccessible.

c. The COFC may deem a late complaint timely if:

- (1) The plaintiff sent the properly addressed complaint by registered or certified mail, return receipt requested;
- (2) The plaintiff deposited the complaint in the mail sufficiently in advance of the due date to permit its timely receipt in the ordinary course of the mail; and
- (3) The plaintiff exercised no control over the complaint from the time of mailing to the time of delivery.

See B. D. Click Co. v. United States, 1 Cl. Ct. 239 (1982)  
(concluding that the contractor failed to demonstrate the applicability of the exception to the timeliness rules).

d. The Fulford Doctrine. See para. VI.F.3, above.

2. Filing Method. RCFC 3. The contractor must deliver its complaint to the Clerk of Court.

3. Contents. RCFC 8(a); RCFC 9(h).

a. If the complaint sets forth a claim for relief, the complaint must contain:

- (1) A "short and plain" statement regarding the COFC's jurisdiction;

(2) A "short and plain" statement showing that the plaintiff is entitled to relief; and

(3) A demand for a judgment.

b. In addition, the complaint must contain, inter alia:

(1) A statement regarding any action taken on the claim by Congress, a department or agency of the United States, or another tribunal;

(2) A clear citation to any statute, regulation, or executive order upon which the claim is founded; and

(3) A description of any contract upon which the claim is founded.

4. The Election Doctrine. See para. II.B.3, above.

F. Procedures.

1. Process. RCFC 4. The Clerk of Court serves 5 copies of the complaint on the Attorney General (or the Attorney General's designated agent).

2. "Call Letter." 28 U.S.C. § 520.

a. The Attorney General must send a copy of the complaint to the responsible military department.

b. In response, the responsible military department must provide the Attorney General with a "written statement of all facts, information, and proofs."

3. Answer. RCFCs 8, 12, and 13. The government must answer the complaint within 60 days of the date it receives the complaint.

4. The court rules regulate discovery and pretrial procedures extensively, and the court may impose monetary sanctions for noncompliance with its discovery orders. See M. A. Mortenson Co. v. United States, 996 F.2d 1177 (Fed. Cir. 1993).
5. Decisions may result from either a motion or a trial. Procedures generally mirror those of trials without juries before federal district courts. The judges make written findings of fact and state conclusions of law.

G. Remedies.

1. The COFC has jurisdiction "to afford complete relief on any contract claim brought before the contract is awarded including declaratory judgments, and such equitable and extraordinary relief as it deems proper." Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 40 (codified at 28 U.S.C. § 1491(a)(3)). See Sharman Co., Inc. v. United States, 2 F.3d 1564 (Fed. Cir. 1993).
2. The COFC has no authority to issue injunctive relief or specific performance, except for reformation in aid of a monetary judgment, or rescission instead of monetary damages. See John C. Grimberg Co. v. United States, 702 F.2d 1362 (Fed. Cir. 1983); Rig Masters, Inc. v. United States, 42 Fed. Cl. 369 (1998); Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981).
3. The COFC may award EAJA attorneys' fees. 28 U.S.C. § 2412.

H. Payment of Judgments. See para. VII.J., above.

I. Appealing an Adverse Decision.

1. Unless timely appealed, a final judgment bars any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy. 28 U.S.C. § 2519.
2. A party must appeal a final judgment to the CAFC within 60 days of the date the party receives the adverse decision. 28 U.S.C. § 2522. See RCFC 72.

## **IX. APPEALS TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT (CAFC).**

### **A. National Jurisdiction.**

1. The Federal Circuit has national jurisdiction. Dewey Elec. Corp. v. United States, 803 F.2d 650 (Fed. Cir. 1986); Teller Envtl. Sys., Inc. v. United States, 802 F.2d 1385 (Fed. Cir. 1986).
2. The Federal Circuit also exclusive jurisdiction over appeals from an agency BCA and the COFC pursuant to section 8(g)(1) of the CDA. 28 U.S.C. § 1295(a)(3) and (10).

### **B. Standard of Review. 41 U.S.C. § 609(b).**

1. Jurisdiction. The court views jurisdictional challenges as “pure issues of law,” which it reviews de novo. See Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992).
2. Findings of Fact. Findings of fact are final and conclusive unless they are fraudulent, arbitrary, capricious, made in bad faith, or not supported by substantial evidence. 49 U.S.C. § 609(b). See United States v. General Elec. Corp., 727 F.2d 1567, 1572 (Fed. Cir. 1984) (holding that the court will affirm a board’s decision if there is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”); Tecom, Inc. v. United States, 732 F.2d 935, 938 n.4 (Fed. Cir. 1995) (finding that the trier of fact’s credibility determinations are virtually unreviewable).

### **C. Frivolous Appeals. The court will assess damages against parties filing frivolous appeals. See Dungaree Realty, Inc. v. United States, 30 F.3d 122 (Fed. Cir. 1994); Wright v. United States, 728 F.2d 1459 (Fed. Cir. 1984).**

### **D. Supreme Court Review. The U.S. Supreme Court reviews decisions of the Federal Circuit by writ of certiorari.**

## **X. CONTRACT ATTORNEY RESPONSIBILITIES IN THE DISPUTES PROCESS.**

### **A. Actions upon Receipt of a Claim.**

1. Review the claim and check the agency's facts and theories.
2. Verify that the contractor has properly certified all claims exceeding \$100,000.
3. Advise the contracting officer to consider business judgment factors, as well as legal issues.

### **B. Contracting Officer's Final Decision.**

1. Prior to reviewing the final decision, determine whether the claim should be certified. If the claim exceeds \$100,000, ensure that a person authorized to bind the contractor properly certified the claim.
2. Ensure that the subject of the final decision is a nonroutine request for payment, rather than a contractor's invoice or preliminary request for adjustment.
3. Review the final decision for sufficiency of factual and legal reasoning.
4. Ensure that the decision letter properly sets forth the contractor's appeal rights.

### **C. R4 File.**

1. Oversee the preparation of the Rule 4 file. If possible, coordinate with the trial counsel assigned to the appeal as to what documents to include/omit from the Rule 4 file.
2. Put privileged documents in a separate litigation file for transmission to the trial attorney.

D. Discovery.

1. Assist the trial attorney in formulating a discovery plan.
2. Identify knowledgeable government and contractor personnel and conduct preliminary interviews of government witnesses.
3. Draft interrogatories, requests for documents, requests for admissions, and other discovery requests. Prepare draft responses to any discovery requests propounded by the appellant.
4. Assist the trial counsel during depositions (e.g., by identifying key contractor personnel and pertinent documents related to the dispute). Coordinate with the trial counsel regarding the feasibility of conducting one or more depositions.

E. Hearings.

1. Through the trial attorney, coordinate with the Chief Trial Attorney concerning appearing as counsel of record.
2. To the extent practicable, assist in witness and evidence preparation.
3. Assist in the preparation and/or review of post-hearing briefs.

F. Client Expectations. Assist the trial attorney in providing the contracting officer and other interested parties regular status updates regarding the appeal.

G. Settlement. Work with the contracting officer and the trial attorney regarding the costs and benefits of litigating the claim. Strive for a position that reflects sound business judgment and protects the interests of the government.

**XI. CONCLUSION.**

**APPENDIX A**

**DISPUTES CLAUSES**

**52.233-1 Disputes.**

As prescribed in 33.215, insert the following clause:

**Disputes (Dec 1998)**

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified as required by subparagraph (d)(2) of this clause. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2)(i) Contractors shall provide the certification specified in subparagraph (d)(2)(iii) of this clause when submitting any claim exceeding \$100,000.

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor."



(3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of \$100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

(h) The Government shall pay interest on the amount found due and unpaid from (1) the date that the Contracting Officer receives the claim (certified, if required); or (2) the date that payment otherwise would be due, if that date is later, until the date of payment. With regard to claims having defective certifications, as defined in (FAR) 48 CFR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of clause)

**Alternate I (DEC 1991).** If it is determined under agency procedures, that continued performance is necessary pending resolution of any claim arising under or relating to the contract, substitute the following paragraph (i) for the paragraph (i) of the basic clause:

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.

(End of clause)

## APPENDIX B

### DISCUSSION PROBLEMS

#### DISCUSSION PROBLEM NO. 1

**FACTS:** GIGANTI Corp. had a contract to build a hangar at Fort Spackler. GIGANTI Corp. subcontracted the site preparation and foundation work to Dirt Movers Inc., which incurred additional costs after encountering differing site conditions during performance of the work. Dirt Movers Inc. submitted the following letter to the contracting officer's representative for the hangar project:

Dear Major David Nile:

My company has incurred additional costs as a result of hitting rock while preparing the site for the construction of the hangar at Fort Spackler. I am requesting the additional costs which to date are \$102,000. I request a contracting officer's decision.

I hereby certify that the claim is well founded and the supporting data (invoice enclosed) is accurate. You can contact me if you wish to discuss this matter further.

Sincerely,

/s/

Garth Raider  
Project Manager  
Dirt Movers Inc.

Does this letter constitute a claim under the Contract Disputes Act? How should the government respond? Discuss.

**DISCUSSION:**

## **DISCUSSION PROBLEM NO. 2**

**FACTS:** The following chronology applies to the Contract Disputes Act claim submitted by Bltfsk's Better Bombs (BBB).

- **3 January (day 0):** Government receives a properly certified claim from BBB requesting a contracting officer's final decision.
- **4 April (day 91):** Contracting officer mails final decision denying BBB's claim.
- **6 April (day 93):** BBB's secretary, Ms. Jean Poole, receives final decision.
- **9 April (day 96):** BBB's president, Mr. Louis Secundo, reviews final decision upon return from vacation.
- **7 July (day 185):** BBB mails notice of appeal to ASBCA.
- **14 July (day 192):** ASBCA receives notice of appeal.

Did the contracting officer act upon BBB's claim in a timely manner? Explain.

Was BBB's appeal to the ASBCA timely? Discuss.

What recourse, if any, does a contractor have if its appeal to the ASBCA is untimely?

**DISCUSSION:**

# *Chapter 27*

## **Alternative Dispute Resolution**



*146th Contract Attorneys Course*

## CHAPTER 27

### ALTERNATIVE DISPUTE RESOLUTION

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## CHAPTER 27

### ALTERNATIVE DISPUTE RESOLUTION

*The moment Alice appeared, she was appealed to by all three to settle the question, and they repeated their arguments to her, though, as they all spoke at once, she found it very hard to make out exactly what they said.*

LEWIS CARROLL, ALICE IN WONDERLAND, (Dell Publishing, 1992) (1865).

#### I. REFERENCES.

- A. Administrative Disputes Resolution Act, 5 U.S.C. §§ 571-84.
- B. Contract Disputes Act, 41 U.S.C. §§ 601-16.
- C. Arbitration, 9 U.S.C. §§ 1 through 14.
- D. FAR Subpart 33.2 - Disputes and Appeals.
- E. Executive Order No. 12988, 65 Fed. Reg. 5 (February 5, 1996)
- F. Executive Order No. 12979, 60 Fed. Reg. 55,171 (October 25, 1995).
- G. DOD Directive No. 5145.5, "Alternative Dispute Resolution."
- H. DoJ guidance, Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (December 29, 2000).

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April / May 2001

- I. DoJ Handbook for Federal Agencies, Core Principles for Federal Non-Binding Workplace ADR Programs; Developing Guidance for Binding Arbitration, 65 Fed. Reg. 50,005 (August 8, 2000).
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- N. Ralph C. Nash, Alternative Disputes Resolution: An Update, The Nash & Cibinic Report, & 25, Vol. 7, No. 5, May 1993.
- O. Frank Carr, Alternative Dispute Resolution in Construction Claims Deskbook, 451 (John Wiley & Sons, 1996).
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## II. BACKGROUND.

- A. The Contract Disputes Act of 1978 (CDA) was one of the first forms of Alternate Dispute Resolution specifically devised for contract disputes. The CDA requires the Boards of Contract Appeals to "provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C. § 607(e).



1. The CDA was designed to encourage the resolution of contract disputes by negotiation prior to the onset of formal litigation. S. Rep. No. 95-1118, reprinted in 1978 U.S.C.C.A.N. 5235
  2. The CDA favors negotiation between the contractor and the agency at the claim stage, before litigation begins. It is at this stage that the agency is typically represented by the contracting officer, who makes the initial decision on a contractor's claim. If the dispute cannot be resolved between the contractor and the contracting officer, the CDA requires the contracting officer to issue a final decision. The contractor can then appeal this final decision to either a Board of Contract Appeals or the Court of Federal Claims. 41 U.S.C. § 605; FAR 33.206 and 33.211.
  3. Since the enactment of the CDA, it has become clear that Congress' goal of providing an inexpensive method for contractors to pursue appeals has not been realized. The judicialized rules of practice and procedure followed by the Boards, combined with the complex nature of many contract claims, has resulted in appeals that are as time-consuming as litigation in federal court.
  4. The Army Corps of Engineers was one of the first government agencies to seriously consider the use of Alternative Dispute Resolution (ADR). The Engineers developed ADR procedures to resolve contract disputes because of:
    - a. the high costs associated with formal litigation;
    - b. the delays in obtaining board decisions; and,
    - c. the disruptions to the agency/management associated with defending against contractor appeals.
- B. Alternative Disputes Resolution Act of 1990. (ADRA). By the end of the 1980s, Congress found that "administrative proceedings had become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes." ADRA, Pub. L. No. 101-552, § 2(2), 104 Stat. 2738 (1990).

1. Congress decided that alternative dispute resolution, used successfully in the private sector, would work in the public sector and would "lead to more creative, efficient and sensible outcomes." ADRA, Pub. L. No. 101-552, § 2(3) and (4), 104 Stat. 2738 (1990).
  2. The ADRA explicitly authorizes federal agencies to use ADR to resolve administrative disputes, including contract disputes. 41 U.S.C. § 605(d).
  3. Under the ADRA, ADR means any procedure used to resolve issues in controversy, including: ombuds, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, or any combination of these techniques. 5 U.S.C. § 571(3).
- C. On October 19, 1996, Congress enacted the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat 3870, amending 5 U.S.C. §§ 571-584 (see also Federal Acquisition Circular 97-09, 63 Fed. Reg. 58,586 (Final Rules) (1998), amending the FAR to implement the ADRA). The Act:
1. permanently authorized the ADR Act;
  2. eliminated the right of federal agencies to opt out of arbitration decisions with which they disagreed;
  3. exempted dispute resolution communications relative to ADR from disclosure under the Freedom of Information Act; and
  4. authorized an exception to full and open competition for the purpose of contracting with a "neutral person" for the resolution of any existing or anticipated litigation or dispute.
- D. It is now the government's express policy to attempt to resolve all contract disputes at the contracting officer level. Agencies are encouraged to use ADR procedures to the maximum extent practicable. FAR 33.204.

1. Agency implementation. The Air Force recently institutionalized its use of ADR by issuance of a comprehensive policy on dispute resolution entitled "ADR First." The policy states that ADR would be the first-choice method of resolving contract disputes if traditional negotiations fail, and represents an affirmative determination to avoid the disruption and high cost of litigation. ADR: Air Force Launches New ADR Initiative; Drafts Legislation to Fund ADR Settlements, Fed. Cont. Daily (BNA) (Apr. 28, 1999).
2. Methods. The methods by which agencies implement ADR use are numerous. Examples include:
  - a. Corporate-level memoranda of agreement (MOAs) between the agency and its contractors that agree in broad terms to the use of ADR. When negotiations at the contracting officer level reach an impasse, the parties agree to use to the maximum extent feasible one or more of the ADR processes contemplated by FAR Part 33.2 to reduce or eliminate the need for litigation.
  - b. Policy initiatives directing all agency major weapon system program managers to set forth in specific terms how they will use ADR to avoid disputes at the program level.

### III. TYPES OF ADR METHODS.

- A. The purpose of any ADR method is to settle the dispute without resorting to costly and time-consuming litigation before the courts and boards. There are a wide variety of ADR methods available, and ADRA authorizes the use of any appropriate method (with some restraints on the use of binding arbitration). ADR methods exist on a continuum, ranging from dispute avoidance to litigation at a contract appeals board.
- B. There are five elements essential to successful use of ADR (FAR 33.214):
  1. existence of an issue in controversy;
  2. a voluntary election by both parties to participate in the ADR process;

3. an agreement on the type of alternative procedures and terms to be used in lieu of formal litigation;
4. participation in the process by officials of both parties who have authority to resolve the issue in controversy; and,
5. claim certification by the contractor when required under 41 U.S.C. § 605(c)(1) (currently claims exceeding \$100,000). ADRA of 1996; Federal Acquisition Circular 97-09, 63 Fed. Reg. 58,586 (Final Rules)(1998); FAR 33.207.

C. Dispute Avoidance (Partnering).

1. Partnering has been described as "attitude adjustment." It is a process by which the contracting parties form a relationship of teamwork, cooperation, and good faith performance. It requires the parties to look beyond the strict bounds of the contract to develop solutions which promote the parties' overriding common goals. Thus, it is a long term commitment between two or more parties for the purpose of achieving mutually beneficial goals.
  - a. The concept has been likened to a three-legged race. The parties must communicate continuously, and be able to foresee where problems are likely to develop, then work together to avoid or resolve them.
  - b. Partnering fosters communication and agreement on common goals and methods of performance. It seeks to develop a "we" attitude toward contract performance, rather than an "us and them" attitude. Examples of common goals are:
    - (1) the use of ADR and elimination of litigation;
    - (2) timely project completion;
    - (3) high quality work;

- (4) safe workplace;
- (5) cost control;
- (6) value engineering;
- (7) reasonable profit;
- (8) paperwork reduction.

2. Partnering is not:

- a. Mandatory. It is not a contractual requirement and does not give either party legal rights. The parties must voluntarily agree to the process, because it is a commitment to an on-going relationship. If either party harbors an adversarial attitude, the process will not work.
- b. A "Cure-All." Reasonable differences will still occur, but one of the benefits of partnering is it ensures the differences are honest and in good faith.

3. Implementing Partnering. Although voluntary, partnering is typically implemented through formal, specific methods which the parties agree upon. An initial workshop, which includes all key players, is followed by subsequent workshops to evaluate and reinforce performance.

- a. Requires commitment of top management officials of all parties.
- b. Parties need to agree to a joint mission statement or formal charter, which lays out general and specific overriding mutual goals.
- c. Parties need to establish clear lines of communication and responsibility, and agree to ADR methods for resolving legitimate disagreements.

- d. Partnering can begin before the contract is signed. By getting the parties to work together during proposal preparation, the proposals can be more accurate, less costly, and more workable.
- 4. Benefits of Partnering. The Army Corps of Engineers Kansas City District's experience has shown that partnering results in completion on schedule, 2/3 reduction in cost overruns, increased value engineering, and significantly reduced paperwork.
  - a. As of June 1993, there were no disputes taken to court on Corps' construction contracts that used partnering. See Partnering: Keeping Contracts Out of the Courtroom, The Government Executive, June 1993.
  - b. Another example is the Portland Bonneville Locke & Dam Project. This \$34 million contract was completed on time, without litigation, and cost growth was limited to 3.3% (whereas 10% was typical on this type of project). The Nash & Cibinic Report, ¶ 32, June 1991; Partnering For Profit, The Military Engineer, September-October 1992.

D. Negotiation.

- 1. Concept. This is simply a matter of exchanging views and proposals. Prior to appeal it is normally done by the contracting officer and the contractor.
- 2. Elements of Successful Negotiation:
  - a. Parties identify issues upon which they differ.
  - b. Parties disclose their respective needs and interests.
  - c. Parties identify possible settlement options.

d. Parties negotiate and bargain over terms and conditions of a final agreement.

3. Goals: For each party to be in a better position after negotiations have concluded than before.

E. Third-Party Assistance.

1. Mediation. Mediation is helpful when the parties are not making progress negotiating between themselves. Mediation is simply negotiation with the assistance of a third party neutral who is an expert in helping people negotiate. See Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, Abrahmson, 64 N.Y. St. B.J. 48.

a. The mediator should be neutral, impartial, acceptable to both parties, and should not have any decision making power.

b. A professional mediator will normally approach a dispute with a formal strategy, consisting of a method of analysis, an opening statement, recognized stages of mediation and a variety of mediation tools for breaking impasses and bringing about a resolution.

c. There are a large number of skilled mediators available in the US, and a federal agency, the Federal Mediation and Conciliation Service (FMCS), is available to assist with mediation.

d. Mediators (as well as arbitrators and other neutrals) may be retained without full and open competition. FAR 6.302-3(a)(2)(iii) and (b)(3). Moreover, adjudicatory functions (like mediating and arbitrating) in ADR methods are not inherently governmental functions for which agencies may not contract. See FAR 7.503(c)(2).

e. Section 7 of the 1996 ADRA requires the President to designate an agency or establish an interagency committee to facilitate and encourage the use of ADR.

- f. Mediation can also take place after appeal, with a neutral judge acting as the mediator. Integrated Systems Group, Inc. v. Department of Energy, GSBICA No. 12176-C, 93-3 BCA ¶ 25,950.
2. Mini-Trials. The term mini-trial is a misnomer. It is not a shortened judicial proceeding. In a mini-trial, the parties present either their whole case, or specific issues, to a special panel in an abbreviated hearing. An advantage of the mini-trial is it forces the parties to focus on a dispute and settle it early.
- a. Mini-trials have been used by the Army Corps of Engineers in several cases. The first was the Tennessee Tombigbee Construction, Inc. in 1985. In that case, Professor Ralph Nash served as the neutral advisor, and a \$17.25 million settlement was worked out between the government and the contractor. See 44 Federal Contracts Reporter (BNA) 502 (1985).
  - b. Participants in a mini-trial include the principals, the parties' attorneys, and witnesses. The principals may choose to employ a neutral advisor.
  - c. In a mini-trial, the attorneys engage in a brief discovery process and then present their case to a specially constituted panel. The panel consists of party principals, and the neutral advisor if desired.
    - (1) Each party selects a principal to represent it on the panel. The principal should have sufficient authority to allow her to make unilateral decisions regarding the dispute, and she should not have been personally or closely involved in the dispute.
    - (2) The parties should jointly select the neutral advisor, and share his expenses. The neutral advisor should possess negotiation and legal skills, and if the issues are highly technical, a technical expert is desirable.



- (a) The neutral advisor may perform a number of functions, including answering questions from the principals, questioning witnesses and counsel to clarify facts and legal theories, acting as a mediator and facilitator during negotiations, and generally presiding over the mini-trial to keep the parties on schedule.
  - (b) If the case is already before a Board of Contract Appeals or the Court of Federal Claims, the neutral advisor will likely be a judge other than the presiding judge. See Denro, Inc. v. Department of Transportation and Dep't of Defense, GSBICA No. 11906-C, May 27, 1993, 1993 GSBICA Lexis 288.
- d. After hearing the case (which may take about two or three days) the principals try to negotiate a settlement. If they reach an impasse, the neutral advisor may try to mediate a solution. If the advisor is a judge, he may discuss the likely outcome if the case were to go to court or the board.
- e. Mini-trials are most appropriate for factual disputes.
- f. Because they are more structured than direct negotiation, the parties may incur more legal costs because of discovery and preparation.
- g. For further discussion of mini-trials, see Page and Lees, 18 Pub. Cont. L.J. 54; Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts; and Abrahmson, 64 N.Y. St. B.J. 48.

F. Adjudicated Methods for Resolving Disputes.

1. Arbitration. In the civil context, arbitration may be binding or non-binding. In the government contracts context, there has been uncertainty concerning the government's authority to agree to, and participate in, binding arbitration. The government's long-established position that its participation in such arbitration is unconstitutional has changed. Indeed, the 1996 ADRA expressly authorized agencies to use binding arbitration with prescribed constraints.
  - a. Non-Binding Arbitration. This form of arbitration aids the parties in making their own settlement. It is best used when senior managers do not have time to sit through a mini-trial and when disputes are highly technical.
    - (1) Normally an informal presentation of the case, done by counsel with client input.
    - (2) Evidence is presented by document, deposition, and affidavit.
    - (3) Few live witnesses.
    - (4) Arbitration panel consists of one to three arbitrators, who serve to control the proceeding, but do not take an active role in the case presentation.
    - (5) The arbitrator's decision or opinion, sometimes called an award, serves to further settlement discussions. The parties get an idea of how the case may be decided by a court or board.
    - (6) The arbitrator may also evolve into the role of a mediator after a decision is issued.
  - b. Binding Arbitration. This form of arbitration results in an award, enforceable in courts.

- (1) Normally a formal presentation of the case, much like a trial, though not necessarily done in a courtroom. Strict rules of evidence may not be followed.
- (2) Evidence is presented by document, deposition, affidavit, and live witnesses, with full cross-examination.
- (3) Arbitration panel consists of one to three arbitrators, who serve to control the proceeding, but do not take an active role in the case presentation.
- (4) Private conversations between the parties and the arbitrators are forbidden. This is much different than mediation, during which private conversations between a party and the mediator are not uncommon.
- (5) The arbitrator has full responsibility for rendering justice under the facts and law.
- (6) The arbitrator's award is binding, so the arbitrator must be more careful about controlling the parties' case presentation and the reliability of the evidence presented.

c. Arbitration proceedings and the arbitrator's qualifications, authority, and award are carefully spelled out under ADRA. See 5 U.S.C. §§ 575-80.

2. Summary Hearings. In practice before the Boards of Contract Appeals, a summary hearing results in a binding decision. The parties try the case informally before a board judge on an expedited, abbreviated basis. There is no appeal from the judge's decision.

3. Board Neutrals/Settlement Judge. The presiding judge refers the case for ADR to the Chief Judge or Clerk for assignment to a neutral or settlement judge. This judge then hears a brief presentation of the case and provides feedback to the parties, as an aid to settlement negotiations. In this case, if ADR is unsuccessful, the case is sent back to the presiding judge for trial. See Westinghouse Electric Corp. v. Department of Transportation and Dep't of Defense, GSBICA No. 11907, 93-3 BCA ¶ 26,203 (successful use of board neutral); see also, Court of Federal Claims General Order # 13 (encouraging ADR).
- G. Appeal. If the parties have not succeeded with some form of ADR by this point, the next step is to appeal the dispute to the Board of Contract Appeal, the Court of Federal Claims, or protest forum of choice.
- H. Effects. The Army Corps of Engineers (ACE), a pioneering organization in the use of ADR, has seen a precipitous decline in claims and appeals as a result of its use of partnering and ADR techniques. Claims dropped from 1,079 in 1988 to 314 in 1994. Appeals declined from 742 in 1991 to 365 in 1994. H. R. Rep. No. 104-597 (1996).

#### IV. TIME PERIODS FOR USING ADR.

- A. Before Appeal or Protest.
  1. Greatest latitude and flexibility for settlement exists at this stage. However, the contracting officer's ability to settle may be subject to agency approval, and oversight by GAO, the IG and Congress. Brittin, 19 Pub. Cont. L.J. at 217.
  2. Appeals. ADRA provides clear and unambiguous government authority for contracting officers to voluntarily use any form of ADR during the period before an appeal is filed. 5 U.S.C. § 572(a); FAR 33.214(c). See also Parrette, 20 Pub. Con. L.J. at 300-01. Ultimately, the use of ADR is up to the contracting officer and the contractor, who may or may not favor an ADR proceeding.

3. Protests. The FAR has long provided authority for agencies to hear protests. The Army Material Command (AMC) and the ACE have been hearing agency protests for years. In October 1995, President Clinton directed government agencies to prescribe administrative procedures for the resolution of protests as an alternative to the more formal protest forums (e.g., GAO). FAR 33.103, which implements this order, now requires agencies to:
  - a. Emphasize that the parties shall use their best efforts to resolve the matter with the contracting officer prior to filing a protest, FAR 33.103(b);
  - b. Provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, using ADR techniques where appropriate, FAR 33.103(c);
  - c. Allow for review of the protest at "a level above the contracting officer" either initially or as an internal appeal, FAR 33.103(d)(4) and,
  - d. Withhold award or suspend performance if the protest is received within 10 days of award or 5 days after debriefing. FAR 33.103(f)(1)-(3). But an agency protest will not extend the period within which to obtain a stay at GAO, although the agency may voluntarily stay performance. FAR 33.103(f)(4).

B. After Appeal or Protest.

1. Once an appeal is filed, jurisdiction passes to the BCA, and the BCA can urge the parties to try ADR if they have not done so already.
2. When an appeal is filed, the Board gives notice suggesting the parties pursue the possibility of using ADR, including mediation, mini-trials, and summary hearings with binding decisions. At this stage, however, the parties are more entrenched in their positions, and settlement may be less likely.

3. The ASBCA has made aggressive use of ADR services in contract appeals disputes. In FY 1999, the ASBCA provided ADR services, both binding and nonbinding, to the parties on 68 occasions. Memorandum, Chairman, Armed Services Board of Contract Services, to Secretary of Defense, subject: Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 1999 (1 Oct. 1999). On limited occasions, the ASBCA provided ADR services to the disputing parties even before the issuance of a final decision.
4. Parties who file appeals with the Court of Federal Claims will also be informed of voluntary ADR methods available through the court. The court considers ADR most appropriate for cases over \$100,000 and which are expected to last more than a week. Settlement judges (other than the presiding judge) and mini-trials are available. Brittin, 19 Pub. Cont. L.J. at 217-18.
5. When a bid protest is filed with the General Accounting Office (GAO), the parties may utilize a GAO "outcome prediction" ADR conference, which involves use of a GAO staff attorney who advises the parties as to the perceived merits of the protest in light of the case facts and prior GAO decisions. The GAO uses these conferences when the protest appears to be clearly meritorious on its face. See TRW, Inc., B-282459.3, Aug. 4, 1999, 99-2 CPD ¶ 26.

## V. APPROPRIATENESS OF ADR.

- A. When is it Appropriate to Use ADR? Agencies "may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." 5 U.S.C. § 572(a). Also, government attorneys are to "make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial." Exec. Order No. 12988, § 1(c).
- B. When is it Inappropriate to Use ADR? An agency should consider not using ADR when:

1. A definitive or authoritative resolution of the matter is required for precedential value, and an ADR proceeding is not likely to be accepted generally as an authoritative precedent. 5 U.S.C. § 572(b)(1);
2. The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and an ADR proceeding would not likely serve to develop a recommended policy for the agency. 5 U.S.C. § 572(b)(2);
3. Maintaining established policies is of special importance, so that variations among individual decisions are not increased and an ADR proceeding would not likely reach consistent results among individual decisions. 5 U.S.C. § 572(b)(3);
4. The matter significantly affects persons or organizations who are not parties to the proceeding. 5 U.S.C. § 572(b)(4);
5. A full public record of the proceeding is important, and an ADR proceeding cannot provide such a record. 5 U.S.C. § 572(b)(5); or,
6. The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstance, and an ADR proceeding would interfere with the agency's ability to fulfill that requirement. 5 U.S.C. § 572(b)(6).

## **VI. STATUTORY REQUIREMENTS AND LIMITATIONS.**

- A. Voluntariness. ADR methods authorized by the ADRA are voluntary, and supplement rather than limit other available agency dispute resolution techniques. 5 U.S.C. § 572(c).
- B. Limitations Applicable to Using Arbitration.
  1. Arbitration may be used by the consent of the parties either before or after a controversy arises. The arbitration agreement shall be:

- a. in writing,
  - b. submitted to the arbitrator,
  - c. specify a maximum award and any other conditions limiting the possible outcomes. 5 U.S.C. § 575(c)(1) and (2).
2. The Government representative agreeing to arbitration must have express authority to bind the Government. 5 U.S.C. § 575(b).
3. Before using binding arbitration, the agency head, after consulting with the Attorney General, must issue guidance on the appropriate use of binding arbitration. 5 U.S.C. § 575(c); see also DFARS Case 97-D304.
4. An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit. 5 U.S.C. § 575(a)(3).
5. If a contractor rejects an agency request to use ADR, the contractor must notify the agency in writing of the reasons. The government, however, only needs to give a written explanation for rejecting a contractor's ADR request if the contractor is a small business. FAR 33.214(b). But See 62 Fed. Reg. 55,628 (proposed FAR amendment requiring Government declination to use ADR in all cases).
6. Once the parties reach a written arbitration agreement, however, the agreement is enforceable in Federal District Court. 5 U.S.C. § 576; 9 U.S.C. § 4.
7. An arbitration award does not become final until 30 days after it is served on all parties. The agency may extend this 30 day period for another 30 days by serving notice on all other parties. 5 U.S.C. § 580(b)(2).
8. A final award is binding on the parties, including the United States, and an action to enforce an award cannot be dismissed on sovereign immunity grounds. 5 U.S.C. § 580(c).



- a. This provision, enacted as part of the 1996 ADRA, put to rest for the time being a long standing dispute as to whether an agency can submit to binding arbitration.
- b. DOJ's Historical Policy. The Justice Department had long opined that the Appointments Clause of Article II provides the exclusive means by which the United States may appoint its officers. DOJ's opinion was that only officers could bind the United States to an action or payment. Because arbitrators are virtually never appointed as officers under the Appointments clause, the government was not allowed to participate in binding arbitration.
- c. DOJ's Present Position. However, DOJ has now opined that there is no constitutional bar against the government participating in binding arbitration if:
  - (1) the arbitration agreement preserves Article III review of constitutional issues; and
  - (2) the agreement permits Article III review of arbitrators' determinations for fraud, misconduct, or misrepresentation. DOJ also points out that the arbitration agreement should describe the scope and nature of the remedy that may be imposed and that care should be taken to ensure that statutory authority exists to effect the potential remedy.
- d. Judicial Interpretation. The Court of Federal Claims has found DOJ's memorandum persuasive and agreed that no constitutional impediment precludes an agency from submitting to binding arbitration. Tenaska Washington Partners II v. United States, 34 Fed. Cl. 434 (1995). Of course, if DOJ's original position is correct, the ADRA of 1996 is unconstitutional.

C. Judicial Review Prohibited. Generally, an agency's decision to use or not use ADR is within the agency's discretion, and shall not be subject to judicial review. 5 U.S.C. § 581(b)(1).

- 1. However, arbitration awards are subject to judicial review under 9 U.S.C. § 10(b).

2. Section 10(b) authorizes district courts to vacate an arbitration award upon application of any party where the arbitrator was either partial, corrupt, or both.
- 
- D. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993. The Act directs each district court to: (1) authorize the use of ADR processes in all civil actions; (2) devise and implement its own ADR program to encourage and promote the use of ADR in its district; (3) examine the effectiveness of existing ADR programs and adopt appropriate improvements; and (4) retain or designate an employee or judicial officer who is knowledgeable in ADR practices and process to implement, administer, oversee, and evaluate the court's ADR program.

## VII. CONCLUSION.

# *Chapter 28*

## **Procurement Fraud**



*146th Contract Attorneys Course*

## **CHAPTER 28**

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## CHAPTER 28

### PROCUREMENT FRAUD

#### I. INTRODUCTION.

#### II. TYPES OF FRAUD.

- A. Defective Product/Product Substitution: These terms generally refer to cases where contractors deliver to the Government goods which do not conform to contract requirements without informing the Government. United States v. Hoffman, 62 F. 3d 1418 (6<sup>th</sup> Cir. 1995).
- B. Defective Testing: This subset of defective products cases results from the failure of a contractor to perform contractually required tests, or its failure to perform such testing in the required manner.
- C. Bid-Rigging: The absence of competition deprives the government of its most reliable measure of what the price should have been. Measure of damages is "the difference between what the government actually paid on the fraudulent claim and what it would have paid had there been fair, open and competitive bidding." United States v. Killough, 848 F.2d 1523, 1532 (11<sup>th</sup> Cir. 1988); see also Brown v. United States, 524 F.2d 693, 706 (1975); United States v. Porat, 17 F.3d 660 (3<sup>rd</sup> Cir. 1993).
- D. Bribery and Public Corruption: The breach of an employee's duty of loyalty. See, e.g., United States v. Carter, 217 U.S. 286 (1910); United States v. Brewster, 408 U.S. 501 (1972).

- E. Defective Pricing: The Truth in Negotiations Act ("TINA"), 10 U.S.C. § 2306a, together with its implementing regulations, 48 C.F.R. § 15.8 et seq. ("Price Negotiation"), requires contractors in certain negotiated procurements to disclose and certify that disclosed details concerning expected costs ("cost or pricing data") are accurate, current and complete. A perceived or actual violation of TINA may serve as the predicate for a fraud investigation and civil or criminal prosecution by the Government. United States v. Broderson, 67 F. 3d 452 (2d Cir. 1995).
- F. False Invoices. Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 545 (10th Cir. 2000) (Monthly invoices submitted when the contractor was knowingly not complying with contract terms can be the basis of False Claims Act liability. A claimant can premise a claim on a "false implied certification of contractual compliance.")

### III. DEPARTMENT OF DEFENSE POLICY FOR COMBATTING PROCUREMENT FRAUD.

#### A. Coordination of Remedies Approach.

- 1. DOD policy requires each department to establish a centralized organization to monitor all significant fraud and corruption cases.

Definition of a "significant" case.

- (1) All fraud cases involving an alleged loss of \$100,000 or more.
  - (2) All corruption cases that involve bribery, gratuities, or conflicts of interest.
  - (3) All investigations into defective products or product substitution in which a serious hazard to health, safety, or operational readiness is indicated (regardless of loss value).
- 2. Each centralized organization monitors all significant cases to ensure that all proper and effective criminal, civil, administrative, and contractual remedies are considered and pursued in a timely manner.

- B. Product Substitution/Defective Product cases receive special attention.
- C. DOD Voluntary Disclosure Program. DOD IG Pamphlet IGDPH 5505.50, Voluntary Disclosure Program—A Description of the Process (April. 1990).

#### **IV. PLAYERS INVOLVED IN FRAUD ABATEMENT.**

- A. DOD Inspector General. Inspector General Act of 1978, Pub. L. 95-452, as amended by Pub. L. No. 97-252; DOD Dir. 5106.1, Inspector General of Department of Defense (Mar. 14, 1983).
- B. Military Criminal Investigative Organizations.
- C. Department of Justice. DOD Dir. 5525.7, Memorandum of Understanding Between Department of Defense and Department of Justice Relating to the Investigation and Prosecution of Certain Crimes (Jan. 22, 1985).
- D. Procurement Fraud Division (PFD), USALSA. AR 27-40, Litigation, Ch. 8.
- E. Procurement Fraud Advisors (PFA) (subordinate commands) - ensure that commanders and contracting officers pursue, in a timely manner, all applicable criminal, civil, contractual, and administrative remedies.

#### **V. REPORTING REQUIREMENTS.**

- A. Indicators of Fraud. Indicators of Fraud in DOD Procurement, IG, DOD 4075.1-H (June 1987). Common examples include:
  - 1. Anticompetitive Activities. 15 U.S.C. § 1.
  - 2. False Statements. 18 U.S.C. § 1001.
  - 3. False Claims. 18 U.S.C. § 287.



- B. Upon receiving or uncovering substantial indications of procurement fraud:
1. PFA should report the matter promptly to their supporting Army Criminal Investigation Command (USACIDC) element.
  2. In such cases, the PFA must also submit a "Procurement Flash Report" to PFD. The flash report should contain the following information:
    - a. Name and address of contractor;
    - b. Known subsidiaries of parent firms;
    - c. Contracts involved in potential fraud;
    - d. Nature of the potential fraud;
    - e. Summary of the pertinent facts; and
    - f. Possible damages.
  3. DFARS 209.406-3 Report. The contracting officer is also required to submit an investigative-referral report.
  4. Remedies Plan. In significant cases, the PFA must prepare a comprehensive remedies plan. The remedies plan should include the following:
    - a. Summary of allegations;
    - b. Statement of adverse impact on DOD mission;
    - c. Statement of impact upon combat readiness and safety of DA personnel; and

d. Consideration of each criminal, civil, contractual, and administrative remedy available.

5. Litigation Report. If the PFA determines that a civil proceeding, such as under the Civil False Claims Act, may be appropriate, the PFA should consult PFD to determine if a litigation report is necessary.

## VI. CRIMINAL STATUTES.

A. Conspiracy to Defraud, 18 U.S.C. § 286 (with claims) and 18 U.S.C. § 371 (in general). The general elements of a conspiracy under either statute include:

1. Knowing agreement by two or more persons which has as its object the commission of a criminal offense, or to defraud the United States; United States v. Upton, 91 F.3<sup>rd</sup> 677 (5<sup>th</sup> Cir. 1996);
2. Intentional and actual participation in the conspiracy; and
3. Performance by one or more of the conspirators of an overt act in furtherance of the unlawful goal. United States v. Falcone, 311 U.S. 205, 210-211 (1940); United States v. Richmond, 700 U.S. 1183, 1190 (8<sup>th</sup> Cir. 1983).

B. False Claims, 18 U.S.C. § 287.

1. The elements required for a conviction under Section 287 include:
  - a. Proof of a claim for money or property, which is false, fictitious, or fraudulent and material.
  - b. Made or presented against a department or agency of the United States; and

- c. Submitted with a specific intent to violate the law or with a consciousness of wrongdoing, i.e., the person must know at the time that the claim is false, fictitious, or fraudulent. See generally United States v. Slocum, 708 F.2d 587, 596 (11<sup>th</sup> Cir. 1983) (citing United States v. Computer Sciences Corp., 511 F. Supp. 1125, 1134 (E.D. Va. 1981), rev'd on other grounds, 689 F.2d 1181 (4<sup>th</sup> Cir. 1981)) (false indemnity claims made to USDA).
  - 2. It is of no significance to a prosecution under section 287 that the claim was not paid. United States v. Coachman, 727 F.2d 1293, 1302 (D.C. Cir.), cert. denied, 419 U.S. 1047 (1984).
- C. False Statements, 18 U.S.C. § 1001.
- 1. The elements include proof that:
    - a. The defendant made a statement or submitted a false entry. "Statement" has been interpreted to include oral and unsworn statements. United States v. Massey, 550 F.2d 300 (5<sup>th</sup> Cir.), on remand, 437 F. Supp. 843 (M.D. Fla. 1977).
    - b. The statement was false.
    - c. The statement concerned a matter within the jurisdiction of a federal department or agency.
    - d. The government also must prove that a statement was "material." The test of materiality is whether the natural and probable tendency of the statement would be to affect or influence governmental action. United States v. Lichenstein, 610 F.2d 1272, 1278 (5<sup>th</sup> Cir. 1980); United States v. Randazzo, 80 F. 3d 623, 630 (1<sup>st</sup> Cir. 1996); United States ex. Rel. Berge v. Board of Trustees University of Alabama, 104 F.3d 1453 (4<sup>th</sup> Cir. 1997).
    - e. Intent.

- (1) The required intent has been defined as "the intent to deprive someone of something by means of deceit." United States v. Lichenstein, 610 F.2d 1272, 1277 (5<sup>th</sup> Cir. 1980).
- (2) A false statement must be knowingly made and willfully submitted. United States v. Guzman, 781 F.2d 428, (5<sup>th</sup> Cir. 1986).

D. Mail Fraud and Wire Fraud: 18 U.S.C. §§ 1341-43.

1. The essence of the mail fraud and wire fraud statutes is the use of mails or wire communications to execute a scheme to defraud the United States. Both statutes are broadly worded to prohibit the use of the mails or interstate telecommunications systems to further such schemes.
2. The elements of the two offenses are similar. Because the elements are similar, the cases interpreting the more recent wire fraud statute rely on the precedents interpreting mail fraud. See, e.g., United States v. Cusino, 694 F.2d 185 (9<sup>th</sup> Cir. 1982), cert. denied, 461 U.S. 932 (1983); United States v. Merlinger, 16 F. 3<sup>rd</sup> 670 (6<sup>th</sup> Cir. 1994). They include:
  - a. Formation of a scheme and artifice to defraud.
  - b. Use of either the mails or interstate wire transmissions in furtherance of the scheme. See United States v. Pintar, 630 F.2d 1270, 1280 (8<sup>th</sup> Cir. 1980) (mail fraud); United States v. Wise, 553 F.2d 1173 (8<sup>th</sup> Cir. 1977) (wire fraud).

E. Major Fraud Act. 18 U.S.C. § 1031.

1. The Act created a new criminal offense of "major fraud" against the United States. It is designed to deter major defense contractors from committing procurement fraud by imposing stiffer penalties and significantly higher fines.

2. Maximum Punishments: ten years confinement; fines are determined on a sliding scale based on certain aggravating factors. Basic Offense: \$1,000,000 per count. Government loss or contractor gain of \$500,000 or more: \$5,000,000. Conscious or reckless risk of serious personal injury: \$5,000,000. Multiple counts: \$10,000,000 per prosecution.
3. Elements:
  - a. Knowingly engaging in any scheme with intent to defraud the U.S. or to obtain money by false or fraudulent pretenses;
  - b. On a U.S. contract; and
  - c. Valued at \$1,000,000 or more. United States v. Brooks, 111 F.3d 365 (4<sup>th</sup> Cir. 1997). But see United States v. Nadi, 996 F.2d 548 (2<sup>nd</sup> Cir. 1993); United States v. Sain, 141 F.3d 463 (Fed. Cir. 1998).

F. Title 10 (UCMJ) Violations.

## VII. CIVIL REMEDIES.

A. The Civil False Claims Act. 31 U.S.C. §§ 3729-33 (1988).

1. Background.
2. 1986 Amendments.
3. The primary litigation weapon for combating fraud is the Civil False Claims Act.

B. Liability Under the False Claims Act.

1. In General. 31 U.S.C. § 3729(a), imposes liability on any person (defined comprehensively in 18 U.S.C. § 1 (1988) to include "corporations, companies, associations, partnerships . . . as well as individuals") who:

- a. Knowingly presents, or causes to be presented, to an officer or employee of the United States government or a member of the Armed Forces of the United States, a false or fraudulent claim for payment or approval. United States v. Krizek, 111 F.3d 934 (D.C. 1997).
- b. Conspires to defraud the government by having a false or fraudulent claim allowed or paid.
- c. Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the United States.

C. Damages.

1. Treble Damages are the substantive measure of liability. 31 U.S.C. § 3729(a); United States v. Peters, 110 F.3d 66 (8<sup>th</sup> Cir. 1997). Voluntary disclosures of the violation prior to the investigation, preclude the imposition of treble damages.

2. Different Scenarios.

- a. Defective Products.
- b. Defective Testing.
- c. Bid-Rigging.
- d. Bribery and Public Corruption.

D. Civil Penalties.

1. An increased civil penalty to between \$5000 and \$10,000 per false claim. 31 U.S.C. § 3729. Imposition is “automatic and mandatory for each false claim.” S. Rep No. 345 at 8-10. See also United States v. Hughes, 585 F.2d 284, 286 (7<sup>th</sup> Cir. 1978) (“[t]his forfeiture provision is mandatory; it leaves the trial court without discretion to alter the statutory amount.”)
2. There is no requirement for the United States to prove that it suffered any damages. Fleming v. United States, 336 F.2d 475, 480 (10<sup>th</sup> Cir. 1964), cert. denied, 380 U.S. 907 (1965). The government also does not have to show that it made any payments pursuant to false claims. United States v. American Precision Products Corp., 115 F. Supp. 823 (D.N.J. 1953).
3. United States v. Halper, 490 U.S. 435 (1989): Defendant faced aggregated penalties of \$130,000 for fraud, which had damaged the government in the amount of \$585. A civil sanction, in application, may be so divorced from any remedial goal as to constitute punishment under some circumstances. The scope of the holding is a narrow one, addressed to “the rare case . . . where a fixed-penalty provision subjects a small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.” See United States v. Hatfield, 108 F.3d 67 (4<sup>th</sup> Cir. 1997).

## VIII. THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT.

### Background.

1. “Qui tam pro domino rege quam pro se ipso in hac parte sequitur.” (“Who as well for the King as for himself sues in this matter.”)
2. Overview of the Process.
  - a. The Civil False Claims Act authorizes an individual, acting as a private attorney general, to bring suit in the name of the United States. 31 U.S.C. § 3730. The statute gives the Government 60 days to decide whether to join the action. If the Government joins the action, the Government conducts the action. If the Government decides not to join the suit, the individual (known as the “qui tam relator” conducts the action.

- b. As an inducement to be a whistleblower, the statute provides that relators are entitled to portions of any judgment against the defendant. 31 U.S.C. § 3730(d).
  - c. If the government joins and conducts the suit, the relator is entitled to between 15 and 25 percent of judgment, depending on the relator's contribution to the success of the suit.
  - d. If the Government declines to join and the relator conducts the suit, the relator is entitled to between 25 and 30 percent of the judgment, at the discretion of the court.
  - e. Limitations on Relators. 31 U.S.C. § 3730(e)(4) significantly limits a person's ability to become a qui tam relator by providing that no court will have jurisdiction over an action "based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or General Accounting Office report, hearing, audit or investigation, or from the news media" unless the person bringing the action is an "original source" of the information. The statute defines "original source" as an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action based on the information.
3. Qui Tam Litigation is a Growth Industry.
4. Qui Tam Developments.
- a. Hughes Aircraft Company v. United States ex rel. Schumer, 520 U.S. 939 (1997). The first United States Supreme Court case to address the qui tam provisions since the 1986 Amendments.
  - b. Bly-Magee v. California, 236 F.3d 1014 (9<sup>th</sup> Cir. 2001). FCA claim viable without proof of government injury; state employees liable for acts beyond official duties.



- c. Searcy v. Philips Electronics North America Corp., 117 F.3d 154 (5<sup>th</sup> Cir. 1997). Federal Circuits split on government's unlimited right to veto qui tam settlements. See Killingsworth v. Northrop Corp., 25 F.3d 715 (9<sup>th</sup> Cir. 1994); United States ex rel Doyle v. Health Possibilities, P.S.C., 207 F.3d 335 (6<sup>th</sup> Cir. 2000).
- d. United States, ex rel. Dhawan v. New York City Health & Hosp. Corp., 2000 U.S. Dist. LEXIS 15,677 (S.D.N.Y. Oct. 27, 2000). Prior state court litigation resulted in public disclosure of FCA allegations.
- e. United States, ex rel. Summit v. Michael Baker Corp., 40 F. Supp. 2d 772 (E.D. Va. 1999) (the court held that a qui tam relator may settle his retaliation claim under the FCA).
- f. Mistick PBT v. Housing Authority for the City of Pittsburgh, 186 F.3d 376 (3d Cir. 1999) (FOIA disclosure is a "public disclosure" under 31 U.S.C. § 3730(e)(4)).
- g. United States, ex rel. Stevens v. Vermont Agency of Natural Resources, 120 S.Ct. 1858 (2000) (A private individual may not bring suit in federal court on behalf of the United States against a state or state agency under the False Claims Act). See also Galvan v. Federal Prison Indus., Inc., 199 F.3d 461 (D.C. Cir. 1999) (Sovereign immunity bars qui tam suit against government corporation).
- h. United States, ex rel. Riley v. St. Luke's Episcopal Hospital, 196 F.3d 514 (5<sup>th</sup> Cir. 1999) (Fifth Circuit rules qui tam enforcement unconstitutional violating the "Take Care" and separation of powers provisions of the Constitution).
- i. United States, ex rel Thorton v. Science Applications Int'l Corp., 207 F.3d 769 (5<sup>th</sup> Cir. 2000) (the value of administrative claims released by a contractor pursuant to a FCA settlement with the government are part of the settlement "proceeds" that the government must share with the relator).

## IX. ADMINISTRATIVE REMEDIES.

### A. Debarment and Suspension Basics. 10 U.S.C. § 2393; FAR Subpart 9.4.

1. Suspension. Action taken by a suspending official to disqualify a contractor temporarily from Government contracting.
2. Debarment. Action taken by a debarring official to exclude a contractor from Government contracting for a specified period.
3. Government policy is to solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only.
4. Debarment and suspension are discretionary administrative actions to effectuate this policy and shall not be used for punishment. FAR 9.103(a); FAR 9.402; United States v. Glymp, 96 F.3d 722, 724 (4<sup>th</sup> Cir. 1996).
5. Debarring and suspending officials. DFARS 209.403. Any person may refer a matter to the agency debarring official. However, the absence of a referral will not preclude the debarring official from initiating the debarment or suspension process or from making a final decision. 64 Fed. Reg. 62984 (Nov. 18, 1999).

### B. Debarment. Causes for debarment. FAR 9.406-2. DFARS 209.406-2.

1. Debarring official may debar a contractor for a **CONVICTION** of or **CIVIL JUDGMENT** for:
  - a. Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract.
  - b. Violation of federal or state antitrust statutes relating to the submission of offers.

- c. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.
  - d. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.
  - e. Criminal conviction for affixing "Made in America" labels to non-American goods.
  - f. Unfair trade practices.
2. Debarring official may debar a contractor, based upon a **PREPONDERANCE OF THE EVIDENCE** for:
- a. Violation of the terms of a government contract or subcontract so serious as to justify debarment, such as
    - (1) Willful failure to perform in accordance with the terms of one or more contracts.
    - (2) A history of failure to perform, or unsatisfactory performance of, one or more contracts.
    - (3) Violation of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.
    - (4) Any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor.
  - b. "Preponderance" means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not. FAR 9.403. See Imco, Inc. v. United States, 33 Fed. Cl. 312 (1995).

C. Suspension. Causes for suspension. FAR 9.407-2.

1. Upon **ADEQUATE EVIDENCE** of:

- a. Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract.
  - (1) Violation of federal or state antitrust statutes relating to the submission of offers.
  - (2) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.
  - (3) Violation of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.
  - (4) Intentionally affixing a "Made in America" label to non-American goods.
  - (5) Unfair trade practices.
  - (6) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.
- b. "Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred. FAR 9.403.
- c. Indictment for any of the causes in paragraph a above constitutes "adequate evidence" for suspension. FAR 9.407-2.

- d. "Adequate evidence" may include allegations in a civil complaint filed by another federal agency. See SDA, Inc., B-253355, Aug. 24, 1993, 93-2 CPD ¶ 132.
- e. Upon adequate evidence, contractor may also be suspended for any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor. FAR 9.407-2.

D. Effect of Debarment or Suspension. FAR 9.405; DFARS 209.405.

- 1. Contractors proposed for debarment, suspended, or debarred may not receive government contracts, and agencies may not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless acquiring agency's head or designee determines that there is a compelling reason for such action.
- 2. Bids received from any listed contractor are opened, entered on abstract of bids, and rejected unless there is a compelling reason for an exception.
- 3. Proposals, quotations, or offers from listed contractors shall not be evaluated, included in the competitive range, or discussions held unless there is a compelling reason for an exception.
- 4. As a result of § 2455 of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994), FAR 9.401 now provides for government-wide effect of the debarment, proposed debarment, suspension, or any other exclusion of an entity from procurement OR nonprocurement activities.

E. Period of Debarment. FAR 9.406-4; DFARS 209.406-4.

- 1. Commensurate with the seriousness of the cause(s). Generally, debarment should not exceed three years except that debarment for violations of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 1481, may be for five years. FAR 23.506.

2. Administrative record must include relevant findings as to the appropriateness of the length of the debarment. Coccia v. Defense Logistics Agency, C.A. No. 89-6544, 1990 U.S. Dist. LEXIS 6079, (E.D. Pa. May 15, 1990). (Upholding 15-year debarment of former government employee convicted of taking bribes and kickbacks from contractors in exchange for contracts.)
3. The period of the proposed debarment, or any prior suspension, is considered in determining period of debarment.
4. Debarment period may be extended, but not solely on the original basis. If extension is necessary, normal procedures apply.
5. Period may be reduced (new evidence, reversal of conviction or judgment, elimination of causes, bona fide change in management).
6. Inconsistent treatment of corporate officials justifies overturning debarment decision. Kisser v. Kemp, 786 F. Supp. 38 (D.D.C. 1992).

F. Period of Suspension. FAR 9.407-4.

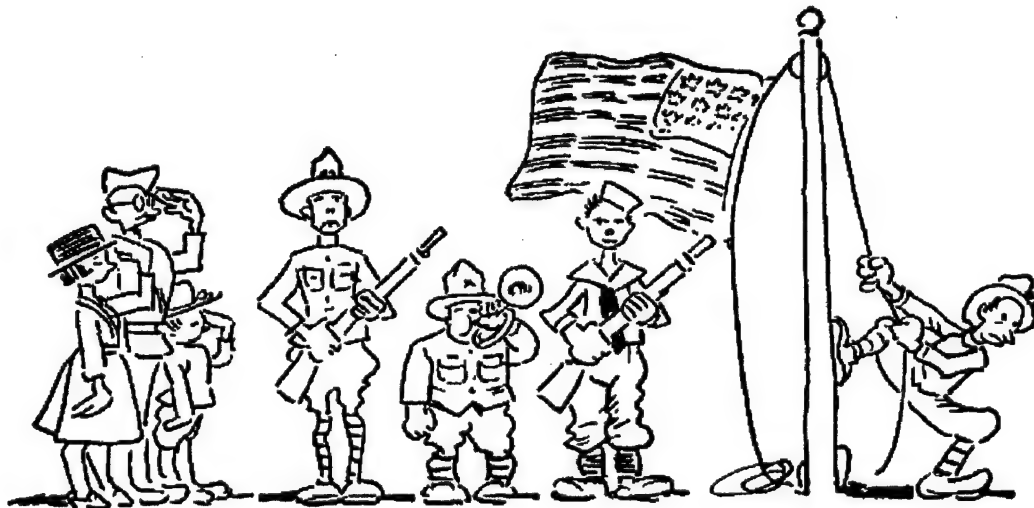
1. Suspension is temporary, pending completion of investigation or any ensuing legal proceedings.
2. If legal proceedings are not initiated within 12 months after the date of the suspension notice, terminate the suspension unless an Assistant Attorney General requests extension.
3. Extension upon request by an Assistant Attorney General shall not exceed 6 months.
4. Suspension may not exceed 18 months unless legal proceedings are initiated within that period.

## **X. CONTRACTUAL REMEDIES.**

- A. Cancellation of the Contract. 18 U.S.C. § 218; FAR Subpart 3.7; Schuepferling Gmbh & Co., KG, ASBCA No. 45564, 98-1 BCA ¶ 29,659.
  - 1. Requires conviction of 18 U.S.C. §§ 201-224 (bribery, gratuities, graft, improper business practices, and conflict of interest).
  - 2. Procedures.
- B. Default Terminations Based on Fraud. A contractor engaging in fraud commits a material breach, which justifies terminating the entire contract for default. Joseph Morton Co. v. United States, 3 Cl. Ct. 120 (1983), aff'd 757 F.2d 1273 (Fed. Cir. 1985).
- C. Denial of Claims Submitted By Contractor. The Contract Disputes Act, 41 U.S.C. § 605(a), prohibits an agency head from settling, compromising or otherwise adjusting any claim involving fraud. FAR 33.210 reflects limitation in CDA - contracting officer must deny any claims involving fraud.
- D. Forfeiture of Claims under the Contract Disputes Act (CDA). 41 U.S.C. § 604. If contractor is unable to support any part of its claim because of fraud, it is liable for the amount equal to such part and all costs of reviewing its claim. See also, Supermex, Inc. v. United States, 35 Fed. Cl. 29 (1996)(forfeiture under 28 U.S.C. § 2514).

## **XI. CONCLUSION.**

***Chapter 29***  
**Contract & Fiscal Law  
for Deploying Forces**



***146th Contract Attorneys Course***



## CHAPTER 29

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#### APPENDIX A: DRAWDOWN AUTHORITIES CHART

#### APPENDIX B: ACQUISITION AND CROSS-SERVICING AGREEMENTS

## CHAPTER 29

### CONTRACT AND FISCAL LAW FOR DEPLOYING FORCES

#### I. REFERENCES.

- A. Army Federal Acquisition Regulation Manual No. 2 (Contingency Contracting), Nov. 1997.
- B. Air Force FAR Supplement, Appendix CC - Contingency Operational Contracting Support Program (COCSP), AFAC 96-3 March 31, 2000.
- C. Joint Pub. 1-06. Joint Tactics, Techniques, and Procedures for Financial Management During Joint Operations, 22 Dec 99.
- D. Joint Pub. 4-0. Doctrine for Logistics Support of Joint Operations, 6 April 2000. (Chapter V, Contractors in Theater)
- E. Field Manual (FM) 27-100, Legal Support to Operations, 1 March 2000.
- F. LOGCAP Resources:
  - 1. AR 700-137, Logistics Civil Augmentation Program (LOGCAP), 16 DEC 85.
  - 2. AR 715-9, Contractors Accompanying the Force, 29 OCT 99.
  - 3. DA PAM 715-16, Contractor Deployment Guide, 27 FEB 98.
  - 4. AMC PAM 700-30. Logistics Civil Augmentation Program (LOGCAP), 31 JAN 00.
  - 5. AMC LOGCAP Battle Book, 31 JAN 00.

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G. LOGCAP Related Resources:

1. AMC PAM 715-18, AMC Contractor Deployment Guide for Contracting Officers, 8 JUL 96.
2. AMC LOGCAP Homepage: [http://www.amc.army.mil/dcs\\_logistics/lg-ol/infopage.html](http://www.amc.army.mil/dcs_logistics/lg-ol/infopage.html).
3. DA PAM 700-31, Commander's Handbook for Peacekeeping Operations (A Logistics Perspective), 1 JUL 94.
4. DA PAM 700-15, Logistics Support of United Nations Peacekeeping Forces, 1 MAY 86.
5. DA PAM 690-80/NAVSO P-1910/AFM 40-8/MCO P12910.1, Use and Administration of Local Civilians in Foreign Areas During Hostilities, 12 FEB 71.

H. FM 100-10-2, Contracting Support on the Battlefield, 15 APR 99.

I. FM 100-21, Contractors on the Battlefield, 26 March 00.

J. CLAMO CD-ROM: Deployed Judge Advocate Resource Library, Second Edition.

K. Air Force Contract Augmentation Program (AFCAP) homepage: <https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pko/gotowar.htm>

L. References on JAGCNET: <http://jagcnet.army.mil/ContractLaw>. (Now also available on the TJAGSA homepage. <http://www.jagcnet.army.mil/TJAGSA>. Once you reach the school's homepage, toggle on "Publications." No password or registration is required.)

## II. INTRODUCTION.

A. Objectives. Following this block of instruction, students should:

1. Understand the importance of planning for contracting operations during deployments.
2. Understand some of the commonly encountered funding issues that arise during deployments.
3. Understand the more frequently used methods of acquiring supplies and services during deployments.
4. Understand the ratification process used to correct irregular procurements.

B. Background.

C. Applicable Law During a Deployment.

1. International Law.
  - a. The Law of War—Combat.
  - b. The Law of War—Occupation. This body of law may be directly applicable, or followed as a guide when no other laws clearly apply, such as in Somalia during Operation Restore Hope.
  - c. International Agreements.
2. U.S. Contract and Fiscal Law.

- a. Armed Services Procurement Act of 1947, as amended. 10 U.S.C. § 2301-31.
  - b. Federal Acquisition Regulation (FAR) and Agency Supplements.
  - c. Fiscal Law. Title 31, U.S. Code; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures; DFAS-IN 37-1; DA Pam 37-100-XX.
- D. Wartime Funding. Congressional declarations of war and similar resolutions may result in subsequent legislation authorizing the President and heads of military departments to expend appropriated funds to prosecute the war as they see fit.
- E. Wartime Contract Law. Congress has authorized the President and his delegees to initiate contracts that facilitate national defense notwithstanding any other provision of law. 50 U.S.C. § 1431-35; Executive Order 10,789 (Nov. 14, 1958); FAR Part 50.

## **II. PREPARATION FOR DEPLOYMENT CONTRACTING.**

- A. General Considerations.
  - 1. Plan early for contracting during a deployment.
  - 2. Identify and train personnel necessary for effective contracting in an overseas theater.
  - 3. Plan to deploy contracting personnel/teams with units to hit the ground first.
  - 4. Allocate assets necessary to support contracting efforts from current unit resources.

B. Contracting Officer/Ordering Officer Support.

1. Identify contracting officer/ordering officer support requirements.
2. Ensure proper appointment and training of contracting officers and ordering officers.
  - a. Only contracting officers and their authorized representatives may obligate government funds.
  - b. Contracting officers may receive their appointments from a Head of a Contracting Activity (HCA), an attaché, a chief of a foreign mission (Army), or certain officials in the Army Secretariat. FAR 1.603; AFARS 1.603-2.
  - c. Ordering officers normally receive their appointments from a chief of a contracting office. AFARS 1.602-2-91.
    - (1) Responsibilities. AFARS Manual No. 2, Appendix E.
    - (2) "Class A" paying agents may not be ordering officers. AFARS Manual No. 2, para. 1-2.i.
  - d. Contracting officers and ordering officers are subject to limitations in appointment letters, regulations, and statutes.
  - e. Training for contracting personnel must include procurement integrity and standards of conduct training. FAR 3.104; DOD Dir. 5500.7-R, Joint Ethics Regulation.



- f. Appointing authorities may limit contracting authority by dollar amount, subject matter, purpose, time, etc., or they may provide unlimited authority. Typical limitations are restrictions on the types of items that may be purchased, and on per purchase dollar amounts. FAR 1.602-1.
- g. Contracting officers execute, administer, or terminate contracts and make determinations and findings permitted by statute and regulation. FAR 1.602-1.

C. Administrative Needs.

- 1. Deployable units should assemble contracting support kits. Administrative needs forgotten may be difficult to obtain in the area of operations. Kits should contain a 90-day supply of administrative needs.
- 2. Legal references.
  - a. Statutes: Titles 10, 31, and 41 of the U.S. Code.
  - b. Regulations: FAR; DFARS; AFARS/AFFARS/NAPS; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures; DFAS-IN 37-1; DA Pam 37-100-99; and command supplements to these publications.
  - c. CD-ROM contract references and LEXIS/WESTLAW software.
  - d. Access to Internet.
- 3. Contract forms.
  - a. DD Form 1155, Purchase Order. See, DFARS 213.3.

- b. Standard Form 44, Purchase Order-Invoice-Voucher. See, DFARS 213.306.
  - c. Standard Forms 26, 30, 33, and 1442.
  - d. Form specifications for common items.
    - (1) Subsistence items, such as bottled water, fruit, etc.
    - (2) Labor and other services.
    - (3) Fuel.
    - (4) Billeting.
    - (5) Construction materials: plywood, gravel.
    - (6) Common items, such as fans, heaters, air-conditioners, etc.
  - e. Translations of contracting forms and provisions.
- 4. Portable office equipment and office supplies.
  - 5. Personnel, including typists and translators.
- D. Finance and Funding Support.
- 1. Certified funding. A deployable unit should coordinate to have funds certified as available in bulk to support deployment purchases. The Finance Officer should provide a bulk-funded DA Form 3953, Purchase Request and Commitment (PR&C), to any deploying unit. (USAF: AF Form 9, USN: NAVCOMPT Form 2276/2275.)

2. Imprest funds. FAR Subpart 13.4; DFARS Subpart 213.305; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, paras. 020901-020908.
  - a. The installation commander may establish imprest funds of up to \$10,000.
  - b. Cashiers must receive adequate training.
  - c. The fund operates like a petty cash fund, and is replenished as payments are made.
  - d. Ordering officers make purchases and provide receipts to cashier.
  - e. The fund should include local currency.
3. "Class A" paying agents. Units must ensure personnel are properly appointed and trained. See DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, para. 020604.

### **III. CONTRACTING DURING A DEPLOYMENT.**

- A. Training and Appointing Contracting Personnel.
  1. Units should ensure that contracting personnel have received necessary training. If time permits, provide centralized refresher training.
  2. Review letters of appointment for contracting officers and ordering officers. Ensure that personnel know the limitations on their authority.
- B. Contracting Support Kit. Review contents of the kit. Ensure that references include latest changes.

C. Requirements Generation.

1. Verification. Ensure that the G-4/J-4 for the operation reviews and approves requirements, to avoid purchases better filled through the supply system. AFARS Manual No. 2, paras. 2-3, 2-4. Verification of requirements is now primarily accomplished by an "acquisition review board," or "ARB," or a "Joint Acquisition Review Board," in the joint environment. See AMC LOGCAP Battle Book, at 37.
2. Statement of Work (SOW) development. See AFARS Manual No. 2, para. 7-5.

D. Competition Requirements.

1. The government must seek competition for its requirements; normally full and open competition, affording all responsible sources an opportunity to compete, is required. 10 U.S.C. § 2304; FAR 6.003. There is no automatic deployment contracting exception.
  - a. The statutory requirement for full and open competition for purchases over the simplified acquisition threshold creates a 45-day minimum procurement administrative lead-time (PALT).
  - b. The 45-day PALT results from a requirement to publish notice of proposed acquisitions for 15 days (synopsizing the contract actions), and then to provide a minimum of 30 days for offerors to submit bids or proposals.
  - c. Three additional time periods extend the minimum 45-day PALT:
    - (1) time needed for requirement definition and solicitation preparation;
    - (2) time needed for evaluation of offers and award of the contract; and time needed for delivery of supplies; or
    - (3) contractual performance of services.
2. Exceptions to the rule.
  - a. Unusual and compelling urgency. 10 U.S.C. § 2304 (c)(2); 41 U.S.C. § 253 (c)(2); FAR 6.302-2.

- (1) This exception authorizes a contract action without full and open competition. It permits the contracting officer to limit the number of sources solicited to those who are able to meet the requirements in the limited time available. FAR 6.302-2.
  - (2) This exception also authorizes an agency to dispense with publication periods (minimum 45-day PALT) if the government would be injured seriously by this delay. It also allows preparation of written justifications after contract award. FAR 6.302-2(c)(1).
- b. National security may provide a basis for limiting competition. It may apply if contingency plans are classified. FAR 6.302-6.
  - c. Public interest is another exemption to full and open competition, but only the head of the agency can invoke it. FAR 6.302-7.
  - d. Use of the unusual and compelling urgency, national security, and public interest exceptions requires a Justification and Approval (J&A). FAR 6.303. Approval levels for justifications are (FAR 6.304):
    - (1) Actions under \$500,000: the contracting officer.
    - (2) Actions from \$500,000 to \$10 million: the competition advocate.
    - (3) Actions from \$10 million to \$50 million: the HCA or designee.
    - (4) Actions above \$50 million: the agency acquisition executive.

- e. Contract actions made and performed outside the United States, its possessions, or Puerto Rico, for which only local sources are solicited, are exempt from compliance with the minimum 45-day PALT time period, but not from the requirement for competition. See FAR 5.202 (a)(12); FAR 5.203(e); see also FAR 14.202-1(a) (thirty-day bid preparation period only required if solicitation is synopsisized). Use bid boards and local advertisements to obtain competition under these circumstances. AFARS Manual No. 2, para. 4-3.e.
- E. Contract Type. Although the contracting officer may select from a variety of contract types, firm-fixed-price contracts are used most often during deployments. See FAR Part 16; AFARS Manual No. 2, para. 9-2. However, LOGCAP and Force "Sustainment" contracts are cost-plus-award-fee contracts.
- F. Methods of Acquisition.
  - 1. Sealed bidding: award is based only on price and price-related factors, and is made to the lowest, responsive, responsible bidder. FAR Part 14.
  - 2. Negotiation: award is based on stated evaluation criteria, one of which must be cost, and is made to the responsible offeror whose proposal offers either the low-cost, technically acceptable solution to the government's requirement, or the one representing the best cost – technical tradeoff, even if it is not lowest in cost. FAR Part 15.
  - 3. Simplified acquisition procedures: used for the acquisition of supplies, nonpersonal services, and construction in amounts below the simplified acquisition threshold. FAR Part 13.
- G. Sealed Bidding as a Method of Acquisition.
  - 1. Contracting officers must use sealed bidding procedures if the four conditions enumerated in the Competition in Contracting Act are present. 10 U.S.C. § 2304(a)(2)(A); Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453.

- a. Time permits the solicitation, submission, and evaluation of sealed bids;
  - b. Award will be based only on price and other price-related factors;
  - c. It is not necessary to conduct discussions with responding sources about their bids; and
  - d. There is a reasonable expectation of receiving more than one sealed bid.
2. Use of sealed bidding allows little discretion in the selection of a source. A clear description or understanding of the requirement is necessary to avoid discussions.
  3. Sealed bidding normally is not used in deployment contracting, at least until the tactical situation stabilizes. It requires more sophisticated contractors, because minor errors in preparing bids will prevent government acceptance; it also requires substantial bid preparation time.

H. Negotiations as a Method of Acquisition.

1. Units use negotiations, which are sometimes called competitive proposal procedures, when sealed bidding is not appropriate. 10 U.S.C. § 2304(a)(2)(B).
2. Letter contracts and oral solicitations can expedite the contracting process under negotiation procedures.
  - a. Letter contracts are preliminary contractual instruments that permit a contractor to begin work immediately. Approvals for use at the HCA level are required. See FAR 16.603; AFARS Manual No. 2, para. 9-2.d(5).



- b. Oral solicitations are permissible when the delay in preparing a written solicitation would be harmful to the government. Use of oral solicitations does not excuse compliance with normal contracting requirements.

3. Negotiations permit greater discretion in the selection of a source.
  - a. Because the government evaluates other criteria in addition to price in a negotiated procurement, substantial time may be required to obtain and evaluate all required information before making an award decision.
  - b. Negotiations procedures permit the government to use a "best value" basis for awarding a contract, and pay more to obtain a better product.
  - c. Offers are solicited by use of a Request for Proposals (RFP) or a Request for Quotations (RFQ).

I. Simplified Acquisition Procedures. Simplified Acquisition is used almost exclusively. Neither sealed bidding or contracting by negotiation are needed with the availability of LOGCAP contract and a \$200,000 threshold.

1. Activities may use simplified acquisition procedures to acquire supplies and services that are not estimated to exceed the simplified acquisition limitation. FAR 13.103(b); All Star Carpet & Bedding, Inc., B-242490.3, Apr. 4, 1991, 91-1 CPD ¶ 352.
  - a. A simplified acquisition is a procurement of supplies, services, and construction in the amount of \$100,000 or less using simplified acquisition procedures. 41 U.S.C. § 403, FAR 13.003.
  - b. Authority to use simplified acquisition procedures for procurements up to \$200,000.

- (1) During a contingency operation as defined in 10 U.S.C. § 101(a)(13), or in peacekeeping or disaster relief operations, the simplified acquisition threshold for contracts awarded and performed outside the United States increases from its normal ceiling of \$100,000 to \$200,000. 10 U.S.C. § 2302(7); DFARS 213.000.
  - (2) DOD has benefited from this increased threshold several times.
  - (3) Under the Commercial Items test program, simplified acquisition methods may be used to purchase commercial item supplies and services for amounts greater than the simplified acquisition threshold, but not greater than \$5,000,000. 10 U.S.C. § 2304(g)(1)(B). The program has been extended until January 1, 2002. See National Defense Authorization Act for Fiscal Year 2000 § 806(b). See also FAR Subpart 13.5.
2. Choice of method. Contracting officers shall use the simplified acquisition method that is most suitable, efficient, and economical. FAR 13.003.
  - a. Purchase orders. FAR 13.302; DFARS 213.302; AFARS Subpart 13.5.
  - b. Government credit card/micropurchase program. Authorized card holders may acquire goods and services up to \$2,500. FAR 13.301; DFARS Subpart 213.301, AFARS Subpart 13.9.
  - c. Blanket purchase agreements (BPA). FAR 13.303; DFARS 213.303, AFARS 13.203.

- d. Imprest funds. FAR 13.305; DFARS 213.306; AFARS Subpart 13.4; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, paras. 020901 to 020908; AR 37-103.

3. Competition requirements.

- a. Up to \$2,500 ("micropurchases"). Only one oral quotation is required, if the contracting officer finds the price to be fair and reasonable. FAR 13.106-2. Northern Va. Football Officials Assoc., B-231413, Aug. 8, 1988, 88-2 CPD ¶ 120. Such purchases must be distributed equitably among qualified sources. FAR 13.202(a)(1). Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258. If practical, a quotation shall be solicited from other than the previous supplier before placing a repeat order.
- b. Over \$2,500 and up to the simplified acquisition threshold. Contracting Officers shall solicit quotations orally to the maximum extent practicable. FAR 13.106-1; Omni Elevator, B-233450.2, Mar. 7, 1989, 89-1 CPD ¶ 248. Normally soliciting three sources is reasonable. FAR 13.104(b). Do not omit incumbent contractors without good reason. See J. Sledge Janitorial Serv., B-241843, Feb. 27, 1991, 91-1 CPD ¶ 225.
- c. Units may not break requirements aggregating more than the simplified acquisition dollar limitation into several purchases to permit the use of simplified acquisition procedures. 10 U.S.C. § 2304(g)(2); FAR 13.003.
- d. Publication of notices. Subject to the following exceptions, the contracting officer is not required to publicize contract actions that do not exceed the simplified acquisition threshold.
  - (1) Public posting of a request for quotations for 10 days is required if the order is estimated to be between \$10,000 and \$25,000, except when ordering perishable subsistence items. 15 U.S.C. § 637(e); 41 U.S.C. § 416; FAR 5.101(a)(2).

(2) For a CONUS contract action, the contracting officer must publish a synopsis of all contract awards exceeding \$25,000 in the Commerce Business Daily. 15 U.S.C. § 637(e); FAR 5.101(a)(1).

(3) There is no requirement to publish a synopsis for a defense agency contract that will be made and performed outside the United States, its possessions or Puerto Rico, and for which only local sources will be solicited. FAR 5.202(a)(12).

4. Scenario: A Special Forces Team is training a foreign unit. The team leader wants to buy \$2,000 worth of materials to support the training from a local store. The team has an ordering officer and a Class A agent. How do they buy the materials the team needs?

J. Using Existing Contracts to Satisfy Requirements. Existing ordering agreements, indefinite delivery contracts, and requirements contracts may already be available to meet recurring requirements, such as fuel and subsistence items.

1. Investigate existing contracts with contracting offices of activities with continuing missions in the deployment region. For example, the Navy had an existing contract for the provision of shore services to its ships in the port of Mombassa, Kenya. This contract was used to provide services to aircraft crews during Operation Provide Relief.
2. Determine whether warranty requirements for major end items require the contractor to provide repair and maintenance service in the deployment region.
3. Fuel. The Defense Energy Support Center may be able to assist in the procurement of fuels in a contingency operation. More information is available at: <http://www.desc.dla.mil/main/deschome.htm>. The DESC emergency phone number is 1-800-TOP OFF (1-800-286-7633).

K. Contract Administration, Changes, Quality Assurance, and Terminations. FAR Parts 42, 43, 46, and 49.

1. Awarding contracts is only half the battle in deployment contracting operations. Contracting personnel must monitor performance closely to ensure the desired goods or services are actually delivered in a timely fashion. AFARS Manual No. 2, para. 9-6.
  - a. Requiring units should provide personnel, such as contracting officer's representatives, to assist in monitoring contractor performance to the extent necessary. AFARS Manual No. 2, para. 7-6.c.
  - b. For larger or more complex requirements, Defense Contract Management Command has trained inspectors and administrative contracting officers to assist with contract administration. FAR Part 42.
  - c. For most contracts, the government relies on the contractor to perform detailed inspections and tests necessary to ensure conformance with contract quality requirements. FAR 46.202-1.
2. Under the Changes clause (see, e.g., FAR 52.243-1, Changes-Fixed-Price), the government has authority to require contractors to perform work necessary to achieve the overall purpose of the contract, even if the work actually needed differs somewhat from that specified in the original contract. The contract price is adjusted (a fair increase or decrease in price for the cost of the changed work, plus a reasonable adjustment to profit), if the government directs a change under the Changes clause. See AFARS Manual No. 2, para. 9-6.e.
3. Government terminations.

- a. Termination for Convenience clauses (FAR 52.249-1 through 52.249-6) give the government the right to terminate contracts without cause when doing so is in the government's interest. The contractor recovers its costs plus a reasonable profit on those costs in a convenience termination, but no anticipatory profits.
- b. Termination for Default clauses (see, e.g., FAR 52.249-8, Default (Fixed-Price Supply and Service)) provide the government with the right to terminate a contract for cause.
  - (1) The three general bases for default termination are:
    - (a) Failure to deliver or perform on time;
    - (b) Failure to make progress which endangers performance; or
    - (c) Failure to perform any other material provision of the contract.
  - (2) Contractors may raise defenses to terminations for default (e.g., excusable delay, unreasonable inspections). If a contractor prevails on a defense, then its remedy is normally conversion of the default termination action to a termination for convenience.
  - (3) If the government terminates a contract for default successfully, the contractor generally receives payment only for goods actually delivered, and is subject to a later assessment of procurement costs (i.e., the cost of cover).
- 4. Practical problems in awarding and obtaining performance under government contracts in overseas theaters. AFARS Manual No. 2, paras. 3-3, 3-7, 9-2.d.(6).



L. Alternative Methods for Fulfilling Requirements.

1. LOGCAP Contract. In 1997, the Army Material Command (CECOM) awarded a cost-plus-award-fee LOGCAP (Logistics Civil Augmentation Program) contract to DynCorp. LOGCAP contract provides for comprehensive logistics and construction support to a deployed force anywhere in the world. Use of this contract to provide logistics support to a deployed force permits a commander to perform a mission with a smaller force than otherwise needed. See AR 700-137; see also GAO/NSIAD-97-63, Contingency Operations. LOGCAP Homepage (Army AMC) is: [http://www.amc.army.mil/dcs\\_logistics/lg-ol/infopage.html](http://www.amc.army.mil/dcs_logistics/lg-ol/infopage.html).
  - a. Civilian contractor.
  - b. Provides logistics/engineering services to deployed forces, in such places as Somalia, Haiti, Rwanda, and Bosnia, East Timor.
  - c. Balkans Force Sustainment Contract. In an effort to maintain continuity, the prior LOGCAP contractor, Brown & Root Services Corporation (BRSC), continues to provide logistics support for US forces in the Balkan theater of operations.
2. AFCAP. Air Force Contract Augmentation Program. Similar to LOGCAP, AFCAP is primarily a civil engineering support contract. AFCAP can also provided limited services. The AFCAP homepage is: <http://www.afcesa.af.mil/Directorate/CEX/AFCAP/afcap.html>.
3. Economy Act. 31 U.S.C. § 1535.
  - a. Executive agencies may transfer funds to other executive agencies, and obtain goods and services provided from existing stocks or by contract. For example, the Air Force may have construction performed by the Army Corps of Engineers, and the Army may have Department of Energy facilities fabricate special devices.

- b. Procedural requirements for Economy Act orders are set forth in FAR Subpart 17.5 and DFARS Subpart 217.5.
  - c. General officer approval is required before placing Economy Act orders outside of DOD. See AL 94-5, Economy Act Orders Outside DOD (4 Aug 94).
- 4. Acquisition & Cross-Servicing Agreements (ACSA). 10 U.S.C. §§ 2341-2350.
  - a. Acquisition & Cross-Servicing Agreements provide DoD with authority to acquire logistic support without resort to commercial contracting procedures (as well as to transfer support to other coalition forces).
  - b. Under the statutes, after consulting with the State Department, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services.
  - c. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis.
- 4. Extraordinary Contractual Actions. Pub. L. No. 85-804; 50 U.S.C. § 1431-35; FAR Part 50.
  - a. The Secretary of the Army has broad residual powers to initiate extraordinary contractual actions to facilitate national defense.
  - b. Procedures for requesting use of these powers are set forth in FAR Subpart 50.4, DFARS Subpart 250.4, and AFARS Subpart 50.4.

M. Leases of Real Property.

1. Authority to lease is delegated on an individual lease basis. AR 405-10, para. 3-3b.
2. The Corps of Engineers using area teams negotiates most leases.
3. Billeting services are acquired by contract, not lease.

#### **IV. POLICING THE CONTRACT BATTLEFIELD.**

##### **A. Ratification. FAR 1.602-3.**

1. Only certain officials (e.g., the chief of a contracting office, Principal Assistant Responsible for Contracting (PARC), or Head of a Contracting Activity (HCA)) may ratify agreements made by unauthorized persons.
2. There are dollar limits to the authority to ratify unauthorized commitments (AFARS 1.602-3(b):
  - a. \$10,000 or less -- Chief of Contracting Office.
  - b. \$100,000 or less -- PARC.
  - c. Greater than \$100,000 -- HCA.
3. A ratifying official may ratify only when:
  - a. The government has received the goods or services.
  - b. The ratifying official has authority to obligate the United States now, and could have obligated the United States at the time of the unauthorized commitment.

c. The resulting contract would otherwise be proper, i.e., adequate funds are available, the contract is not prohibited by law, etc.

d. The price is fair and reasonable.

4. Scenario: A brigade supply officer was swamped with requests for blankets when the desert nights turned unseasonably cold. He located a blanket factory with 1500 blankets in stock, and arranged delivery after agreeing that the U.S. government would pay the wholesale price of \$12 per blanket. What should the division finance officer do when the factory owner shows up with an invoice for \$18,000 worth of blankets and wants to be paid?

B. Extraordinary Contractual Actions. FAR Part 50.

1. If ratification is not appropriate (e.g., no price agreement with supplier), informal commitment procedures may allow compensation. FAR 50.302-3.
2. Requests to formalize informal commitments must be based on a request for payment made within six months of furnishing the goods or services; also, normal contracting procedures must have been impracticable at the time of the commitment to use extraordinary procedures. FAR 50.203(d).
3. These procedures have been used to reimburse owners of property taken during the Korean War (AFCAB 188, 2 ECR ¶ 16 (1966)); in the Dominican Republic (Elias Then, Dep't of Army Memorandum, 4 Aug. 1966); Jaragua S.A., ACAB No. 1087, 10 Apr. 1968; and in Panama (Office of the Gen. Counsel, Dep't of Army Memorandum, Jan. 1990).

C. General Accounting Office (GAO) Claims.

1. The GAO has broad authority to settle claims against the United States. 31 U.S.C. § 3702(a); Claim of Hai Tha Trung, B-215118, 64 Comp. Gen. 155 (1984). The procedures are set forth in 4 C.F.R. Part 30 and in GAO Policies and Procedures Manual for the Guidance of Federal Agencies, Title 4.
2. Voluntary Creditors. Generally, government employees who make payments from private funds on behalf of the U.S. may not be reimbursed. See 31 U.S.C. § 1342; see also Voluntary Payments-Gov't Reimbursement Liability, B-115761, 33 Comp. Gen. 20 (1953). A limited exception to this rule applies to urgent, unforeseen emergencies. Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. Circumstances authorizing reimbursement include protection of government property; Meals-Furnishing-Gen. Rule, B-177900, 53 Comp. Gen. 71 (1973); and, unforeseen impediments to completion of an urgent agency mission; Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, *supra*.
3. If the GAO believes that it cannot pay a meritorious claim because an appropriation is not available for its payment, GAO reports to Congress. 31 U.S.C. § 3702(d). This report may form the basis for congressional private relief legislation.

D. Claims Under the Contract Disputes Act. FAR Subpart 33.2.

1. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-13, provides a statutory framework for resolution of claims arising under, or relating to, a government contract.
2. General procedures under the CDA.
  - a. Contractor or the government asserts a claim, which the contracting officer reviews and evaluates for a decision;
  - b. The contracting officer renders a final decision on the claim; and
  - c. The contractor may appeal the final decision to either the U.S. Court of Federal Claims or the agency board of contract appeals.

E. Redeployment. Ensure payments are finalized and recorded before redeployment. Coordinate for transfer of files to parent contracting organization for holding and resolution of issues that arise after redeployment.

V. FISCAL LAW DURING DEPLOYMENTS.

A. Major Considerations.

1. Verify fund types and amounts available to deploying units.
2. Ensure deploying attorneys have a basic understanding of the commonly encountered fiscal controls on the use of appropriated funds.

B. Basic Fiscal Controls on Appropriated Funds.

1. Obligations and expenditures must be for a proper purpose (see Secretary of the Interior, B-120676, 34 Comp. Gen. 195 (1954))
  - a. Expenditure must be necessary and incident to the general purpose of the appropriation;
  - b. Expenditure must not be prohibited by law; and
  - c. Expenditure must not be otherwise provided for (i.e., within the scope of some other appropriation).
2. Obligations must occur within the time limits applicable to the appropriation (e.g., operations and maintenance funds are available for obligation for one fiscal year; see 31 U.S.C. § 1502(a)); and
3. Obligations must be within the amounts established by Congress and by the executive branch through formal subdivisions of funds (e.g., OMB apportionments; see 31 U.S.C. §§ 1341, 1517).

C. Operations and Maintenance (O&M) Appropriations.

1. These appropriations are used to pay for the day-to-day expenses of exercises, deployments, and contingency operations.
2. O&M funds are not available for:
  - a. Procurement of end items costing \$100,000 or more, or end items that are centrally managed regardless of cost.
  - b. Any construction related to military exercises outside the United States coordinated or directed by the Joint Chiefs of Staff (JCS), or any construction in excess of \$500,000 (or greater than \$1,000,000 to correct deficiencies that affect life, health, or safety). 10 U.S.C. § 2805(c)(2).

D. Feed and Forage Act: Special Obligation Authority.

1. 41 U.S.C. § 11 & 11a permit DOD and the Coast Guard respectively to contract for clothing, subsistence, forage, fuel, quarters, transportation or medical and hospital supplies for the current fiscal year, even in the absence of an appropriation. Notice to Congress is required.
2. On August 24, 1990, the Secretary of Defense invoked the provisions of 41 U.S.C. § 11 to support Operation Desert Shield. This Act was invoked again for operations in Haiti.

E. Emergency & Extraordinary (E&E) Expenses. Within appropriations made for this purpose, SecDef may pay for any emergency or extraordinary expenses that cannot be anticipated or classified. SecDef may spend the funds appropriated for such purposes as deemed proper; and such determination is final and conclusive upon the accounting officers of the U.S. This authority may be delegated (and redelegated). 10 U.S.C. § 127(b). DoD Authorization Act for FY 1996 revised § 127 to require that SecDef give congressional defense and appropriations committees 15 days advance notice before expending or obligating funds in excess of \$1 million and five days advance notice for expenditures or obligations between \$500K and \$1M. Pub. L. No. 104-106, § 915 (1996).

F. CINC Initiative Fund. These funds are available to fund special training, humanitarian and civil assistance, and other selected operations. 10 U.S.C. § 166a. DoD Dir. 7280.4, 26 Oct 1993; CJCSI 7401.01A, 30 Jan 1999.

G. Military Construction Appropriations. Congressional oversight is extensive and pervasive. Military services may accomplish only minor construction projects (i.e., \$1.5 million or less in cost) without prior approval of Congress.

1. The Military Construction Codification Act (MCA).

- a. The Act's purpose was to revise and codify in a new chapter (Chapter 169) of Title 10, U.S.C., the recurring and permanent provisions of law related to military construction and family housing.



- b. In the "Specified" Military Construction Program, Congress provides annual approval and funding for the DOD military construction program. Congress funds specific construction projects in the annual Military Construction Appropriations (MCA) Act with a lump sum appropriation. The conference report provides a by-project break down for this lump sum amount. The specified military construction program normally consists of construction projects projected to exceed \$1.5 million.
- c. In the "Unspecified" Minor Military Construction Program, Congress provides annual funding and approval to each military department for minor construction projects not specified in the conference report accompanying the MCA Act. Congress appropriates such Minor Military Construction (MMC) funds to each military department. The Army's share of the MMC funds is titled "Minor Military Construction, Army" (MMCA) in the appropriation acts.
  - (1) Pursuant to the "unspecified" minor construction authority of 10 U.S.C. § 2805(a), Service Secretaries may use MMC funds for minor projects not specifically approved by Congress. This authority is limited to \$1.5 million for each project.
  - (2) The minor construction threshold for projects intended solely to correct deficiencies which threaten life, health, or safety is \$3 million. 10 U.S.C. § 2805(a)(1).
- d. The Service Secretary must notify Congress before commencing certain minor military construction projects. See, e.g., 10 U.S.C. § 2805(b)(2) (minor construction exceeding \$500,000).

2. O&M Appropriation.

- a. Most installations fund their routine operations with O&M funds. The military services use O&M funds for military construction activities performed in furtherance of specific operational requirements of the services only pursuant to specific authorization from Congress.
  - b. Congress has authorized DOD to use O&M funds of up to \$500,000 for unspecified MMC projects. 10 U.S.C. § 2805. This authorization is limited to \$500,000 for each project.
3. Prohibition on Use of O&M Funds for Minor Construction During JCS Exercises Outside the United States.
- a. DOD must fund from the services' unspecified minor construction accounts **all** exercise-related construction projects coordinated or directed by the Joint Chiefs of Staff (JCS) outside the United States. Furthermore, Congress has limited the authority for exercise-related construction to no more than \$5 million per military department per fiscal year. 10 U.S.C. § 2805(a)(2).
  - b. This statute resulted from an opinion issued by the GAO regarding construction and related activities undertaken during joint and combined exercises in Honduras in 1983 -- the Ahuas Tara (Big Pine) II exercise. To The Honorable Bill Alexander, U.S. House of Representatives, B-213137, 63 Comp. Gen. 422 (1984).
  - c. The statute does not affect funding of minor and truly temporary structures such as tent platforms, field latrines, shelters, and range targets that forces remove once the exercise is completed. These may continue to be funded with the O&M accounts.

4. Notification Requirement for Military Exercise Construction Spending in Excess of \$100,000. Congress requires the Secretary of Defense to give prior notice of the plans and scope of any proposed military exercise involving United States personnel if the estimated amount for construction, either temporary or permanent, will exceed \$100,000. SECDEF must give the congressional committees 30 days to respond to the notification. See Military Construction Appropriations Act, 1999, Pub. L. 105-237, § 113, 112 Stat. 1558 (1998).

5. Expansion of permissible use of O&M funds during combat and contingency operations.
  - a. Units may use O&M funds, without dollar limitation, for the acquisition of materials and/or cost of erection of structures which:
    - (1) are of a temporary operational nature and operational forces intend to use for only a temporary period as required to facilitate combat and contingency operations; and
    - (2) will not be used to sustain permanent or contingency operations, or to facilitate future exercises at the conclusion of the hostilities.
  - b. Normal funding rules regarding military construction and procurement of investment items apply in all other situations, including construction for which the United States will have follow-on or contingency uses after ending the operations.
  - c. Such use of O&M funds should occur only after advance notice to and approval from the agency's General Counsel's Office. See Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000) (stating that the Army should use O&M funds to build structures during combat and contingency operations if the structures "are clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations"); see also Office of the General Counsel, Fiscal Law Outline, Section P: Current Issues, <<http://www.hqda.army.mil/ogc/eandfoutline-secp.htm>>.
6. Statutory Definition of Military Construction. 10 U.S.C. § 2801(a) & (b); 10 U.S.C. § 2805.

- a. Military construction includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation.
  - b. It includes all work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility.
  - d. A "Minor Military Construction Project" is a military construction project which has an approved cost less than or equal to \$1.5 million per project (or \$3 million if the project is intended solely to correct deficiencies which threaten life, health, or safety).
7. Service Definitions of Construction. AR 415-15, Glossary, sec. II; AFI 65-601, vol. 1, ch. 9, OPNAVINST 11010.20F, chap. 6, para. 6.1.1., (Navy Manual).
- a. The acquisition, erection, installation, or assembly of a new facility.
  - b. Construction includes some types of work on an existing facility.
    - (1) A change to a real property facility, such as expansion or extension of, the facility that adds to its overall external dimensions.
    - (2) Alteration of the interior or exterior arrangements of a facility to improve its current purpose. This includes installation of equipment made a part of the existing facility. Additions, expansions, and extensions of facilities are not alterations.

- (3) Conversion of the interior or exterior arrangements of a facility so that the facility can be used for a new purpose. This includes installation of equipment made a part of the existing facility.
  - (4) Replacement of a real property facility, which is a complete rebuild of a facility that has been destroyed or damaged beyond economical repair.
- c. Construction includes relocation of a facility from one location to another.
  - (1) Construction encompasses efforts to move a structure from one site to another. A facility may be disassembled and later reassembled, or moved intact. Work includes connection of new utility lines, but excludes relocation of roads, pavements, or airstrips.
  - (2) Relocation of two or more facilities into a single facility is a single project.
- d. Construction also includes:
  - (1) Installed equipment in a facility. Examples include built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning, waste disposals, dishwashers, and theater seats.
  - (2) Site preparation, excavation, filling, landscaping, or other land improvements.

- (4) AFI 65-601, Vol. 1, 9.1.1, defines construction as all land acquisition, acquiring and constructing facilities, adding to, expanding, extending, converting, altering or replacing existing facilities, relocating facilities, planning and design, construction overhead, equipment made part of the facility and demolition.
8. Maintenance and Repair. Maintenance and repair are NOT construction. AR 420-10; AFI 32-1032, subch. 3.3, OPNAVINST 11010.20F, chap. 3, para. 3.1.1; chap. 4, para 4.1.1. Repair and maintenance are not subject to the \$500,000 O&M limitation on construction.
- a. Maintenance is recurrent work to prevent deterioration. It is work required to preserve or maintain a facility in such condition that it may be used for its designated purpose.
  - b. AFI 32-1032, 3.3.1 defines maintenance as day-to-day work required to preserve real property facilities and prevent premature failing or wearing out of system components.
  - c. The Navy Manual provides essentially the same as the Air Force definition. However, it does provide guidance for differentiating between maintenance and repair work which should be used by all services. It states, "generally, maintenance differs from repair in that maintenance does not involve the replacement of major constituent parts of a facility, but is the work done on such parts to minimize or correct wear and tear and ensure the maximum reliability and useful life of the facility or component."
  - d. Examples include elimination of hairline cracks, cyclic painting, waterproofing, cleaning of wood floors, grass cutting, fertilization, road surface treatment, dredging to a previously established depth, and filling joints.

e. Repair. Using operation and maintenance funds available, the military service Secretary concerned may carry out repair projects for an entire single-purpose facility or one or more functional areas of a multipurpose facility. 10 U.S.C. § 2811 (1997); see DOD Reg. 7000.14-R, vol. 2B, ch. 8, para. 080105 (new definition of repair).

- (1) Repair means to restore a real property facility, system or component to such a condition that it may effectively be used for its designated functional purpose.
- (2) When repairing a facility, the components of the facility may be repaired by replacement, and the replacement can be up to current standards or codes. For example, Heating, Ventilation, and Air Conditioning (HVAC) equipment can be repaired by replacement, can be state-of-the-art, and provide for more capacity than the original unit due to increased demand/standards. Interior rearrangements (except for load-bearing walls) and restoration of an existing facility to allow for effective use of existing space or to meet current building code requirements (for example, accessibility, health, safety or environmental) may be included as repair.
- (3) Additions, new facilities and functional conversions must be done as construction. Construction projects may be done concurrent with repair projects as long as the projects are complete and usable.
- (4) Army guidance: (AR 420-10; see Memorandum, Department of the Army, Assistant Chief of Staff for Installation Management, 4 Aug 1997, subject: New Definition of "Repair.")
  - (a) A facility must exist and be in a failed or failing condition in order to be considered for a repair project. Therefore, this factual prerequisite must be met before any work can be considered repair.



- (b) Once the determination has been made that the facility is in need of repair, then the agency must determine the extent of repair work. When repairing a facility, you may bring the facility (or component of a facility) up to applicable codes or standards as repair. An example would be adding a sprinkler system as part of a barracks repair project. Another example would be adding air conditioning to meet current standards when repairing a facility. Pursuant to the new definition, moving load-bearing walls, additions, new facilities and functional conversions must be done as construction.
    - (c) Bringing a facility (or component thereof) up to applicable codes or standards for compliance purposes only, when a component or facility is not in need of repair, is construction.
  - (5) Examples of repair include re-roofing; carpet replacement; total re-plastering; dead tree replacement; adding insulation and siding; repaving roads; and replacing stone, gravel, or sand.
  - f. Construction work accomplished simultaneously with maintenance or repair--where does maintenance or repair end and construction begin? See AR 420-10, para. 3-1.
  - g. Caveat: The replacement of a real property facility that has been destroyed or damaged is construction. 10 U.S.C. § 2854.
9. Methodology for analysis of minor construction issues.
- a. Define the scope of the project;
  - b. Classify the work as construction, repair, or maintenance;

- c. Determine the funded and unfunded costs of the project;
- d. Select the proper appropriation;
- e. Obtain the required approvals.

H. Emergency Construction Authorities.

1. 10 U.S.C. § 2808 provides that, upon Presidential Declaration of National Emergency, the Secretary of Defense may undertake construction projects, not otherwise authorized by law, that are necessary to support the armed forces. See AR 415-15, app. D, para. D-2, AFI 65-601, AFI 32-1021, OPNAVINST 11010.20E, Facilities Projects Manual (June 7, 1996) (Hereinafter Navy Manual).
  - a. Funds for such projects come from savings on other construction contracts, unobligated military construction and family housing appropriations.
  - b. On November 14, 1990, President Bush invoked emergency construction authority under 10 U.S.C. § 2808 to support Operation Desert Shield. See Executive Order 12734 of 14 Nov 1990, 55 Fed. Reg. 48,099.
2. Two other emergency construction authorities require prior notice and waiting periods:
  - a. Emergency Construction. 10 U.S.C. § 2803. See AR 415-15, para. 1-6.b(2); AFI 65-601, Vol. 1, 9.12.3; Navy Manual.
    - (1) Requires the Service Secretary to notify the congressional appropriations committees;
    - (2) Must justify projects as vital to the national defense. The Air Force instruction and Navy Manual provide that the Secretary must justify the project as being so urgent that project deferral to the next Military Construction Appropriation Act would be inconsistent with national security, health, safety or environmental quality;

- (3) Must wait 21 days after notification before beginning projects; and
- (4) Must use unobligated military construction funds, and must not exceed \$30 million in any fiscal year.

b. Contingency Construction. 10 U.S.C. § 2804. See AR 415-15, para. 1-6.b(6); AFI 65-601, Vol. 1; Navy Manual.

- (1) Requires the SECDEF to notify the Congressional appropriations committees;
- (2) Must justify the project, and the Air Force must justify why the project cannot wait for inclusion in the next Military Construction Appropriation Act;
- (3) Must wait 21 days after notification before beginning the project; and
- (4) Must use funds appropriated for this purpose (generally about \$4.5 million in each FY). AFI 32-1021 states that the use of these funds is rare. The Air Force must consider using emergency construction authority first and justify to the SECDEF as to why they were not used.

3. Overseas Contingency Operations Transfer Fund (OCOTF). DoD Appropriations Act for FY 2001, Pub. L. No. 106-259, Title II (2000). Appropriates \$3.94B of "no-year" funds "for expenditures directly relating to Overseas Contingency Operations by U.S. Military Forces." These funds may be transferred to O&M accounts, military personnel accounts, Defense Health Program appropriation, procurement accounts, RDT&E accounts, and working capital funds.<sup>1</sup> H.Rep. 106-754, the Conference Report accompanying the Appropriations Act, states this amount covers the estimated costs of continuing operations in Bosnia, Kosovo, and Southwest Asia. *See*, DoD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 17, Contingency Operations (June 2000), and DoD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 12, Special Accounts Funds and Programs, ch. 23, Contingency Operations (Sep 1996).
4. Mobility Enhancement Fund. The SECDEF may use "mobility enhancement funds" for minor construction work (i.e., construction projects that do not exceed \$1.5 million) that "enhance[s] the deployment and mobility of military forces and supplies. 10 U.S.C. § 2805(c). Only TRANSCOM is authorized to use this "Mobility Enhancement Fund."

I. Humanitarian and Civic Assistance (HCA).

1. DOD and the State Department receive separate appropriations for humanitarian assistance. Any significant civic action projects must be funded from these appropriations. 10 U.S.C. § 401. *See also*, DOD Dir. 2205.2, 6 Oct 1994; DOD Inst. 2205.3, 27 Jan 1995.
2. Definition of HCA. 10 U.S.C. § 401(e).
  - a. Medical, dental, and veterinary care in rural areas of a country;

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<sup>1</sup> DOD Appropriations Act for FY 2001 § 8131, Pub. L. No. 106-259, 114 Stat. 661.

None of the funds appropriated in this Act under the heading "[OCOTF]" may be transferred or obligated for [DOD] expenses not directly related to the conduct of overseas contingencies: *Provided*, That the [SECDEF] shall submit a report no later than 30 days after the end of each fiscal quarter to the Committees on Appropriations of the Senate and House of Representatives that details any transfer of funds from the "[OCOTF]": *Provided further*, That the report shall explain any transfer for the maintenance of real property, pay of civilian personnel, base operations support, and weapon, vehicle or equipment maintenance.

- b. Construction of rudimentary surface transportation systems;
  - c. Well drilling and construction of basic sanitation facilities;
  - d. Rudimentary construction and repair of public facilities; or
  - e. Education, training, technical assistance, and related activities for landmine detection and clearance.
3. Generally, substantial HCA should be carried out through the Department of State (DOS) under the authority of the Foreign Assistance Act (FAA), 22 U.S.C. § 2301-2349aa-9.
4. However, DOD may provide a limited amount of HCA, with specific approval of DOS. See DOD Dir. 2205.2, Humanitarian and Civic Assistance (HCA) Provided in Conjunction with Military Operations. Such HCA must promote:
- a. The security interests of both the U.S. and the country in which the activities are to be carried out; and
  - b. The specific operational readiness skills of the members of the armed forces who participate in the activities. See 10 U.S.C. § 401(a)(1).
5. De minimis HCA. In addition to the funds specifically earmarked for HCA, DOD may make minimal expenditures for HCA using other funds. DOD may use general O&M funds only for the incidental costs of carrying out *de minimis* HCA. The determination of what is minimal is made by the commander of the unified command involved. 10 U.S.C. § 401(c)(2); DOD Dir. 2205.2.

6. Humanitarian Assistance – 10 U.S.C. § 2551. To the extent provided in authorization acts, funds appropriated to DOD for humanitarian assistance shall be used for providing transportation of humanitarian relief and *other* humanitarian purposes worldwide. In FY 1999 \$50M has been appropriated for Overseas Humanitarian, Disaster and Civic Aid programs of the DOD under §§ 401, 402, 404, 2547, and 2551.
  7. The CINC Initiative Fund also is available for humanitarian assistance. 10 U.S.C. § 166a; Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01.
- J. Security Assistance. Funding aid to foreign armies is specifically provided for in foreign assistance appropriations.
1. Transfers of defense items and services to foreign countries is regulated by the Arms Export Control Act. 22 U.S.C. § 2751-96.
  2. Providing weapons, training, supplies, and services to foreign countries must be done in compliance with the Foreign Assistance Act (10 U.S.C. § 2151-2430i) and other laws. Past problems:
    - a. Joint training exercises that have the principal purpose of training foreign forces to operate U.S. weapons.
    - b. Provision of U.S. military uniforms to friendly foreign forces to prevent misidentification and so these forces could restore order in "occupied" areas.
    - c. Transfer of U.S. military equipment to allies to facilitate interoperability.
  3. Host nation support. Consider the primary purpose of the expenditure. If operational requirements, use DOD funds. If to benefit the host nation, specific authority as outlined below is needed.

K. Support to the United Nations (UN).

1. Supplies, services, and equipment.

- a. Section 7 of the UN Participation Act (UNPA), 22 U.S.C. § 287d-1. The President, on request of UN, may furnish services, facilities, or other assistance in support of UN activities directed to peaceful settlement of disputes (e.g., Chapter VI/peacekeeping operations).
- b. Reimbursement. Section 723 of the FY 00-01 Foreign Relations Authorization Act (as enacted in Pub. L. No. 106-113) amended the UNPA to add a new Section 10. Section 10 requires the United States to obtain reimbursement from the UN for DoD assistance that is provided to or for an assessed UN peacekeeping operation, or to facilitate or assist the participation of another country in such an operation. The statute provides for several exemptions and grounds for waiver. This requirement to receive reimbursement is not limited to assistance provided under the UNPA, but applies to any authority under which assistance may be provided to an assessed peacekeeping operation.
- c. Section 607 of the FAA; 22 U.S.C. § 2357. Requires presidential determination. Authorizes furnishing "commodities and services" to friendly foreign governments and international organizations for purposes such as peacekeeping and disaster relief. Advance payment or reimbursement is required.

2. Details of personnel.

- a. Section 7 of the UNPA. President may detail U.S. military personnel to UN Chapter VI/peacekeeping operations to serve as observers, guards, or in any other noncombatant capacity. Authority is limited to 1,000 persons world-wide at any one time. Does not authorize detail of personnel to Chapter VII/peace enforcement operations. Reimbursement is required unless the President waives.



- b. Sections 628 and 630 of the FAA, 22 U.S.C. § 2388 and 2390. Presidential determination required. The head of an agency may detail or assign an officer or employee of the agency to an international organization to serve on the agency staff or render technical, scientific, or professional advice or service. This is interpreted broadly and has been used as authority to detail U.S. military personnel to UN Chapter VII peace enforcement operations. Reimbursement may be waived.

L. Support to Third Countries.

- 1. Acquisition and Cross-Servicing Agreements (10 U.S.C. §§ 2341-2350). Limited, DOD-specific authority to transfer logistics support outside Arms Export Control Act (AECA) channels.
  - a. Agreements with NATO countries, NATO subsidiary bodies, other designated eligible countries, and the UN and other international regional organizations of which the United States is a member, that provide for the reciprocal provision of logistic support, supplies, and services.
  - b. Limited to the purchase and sale of logistic support; does not extend to major end items of equipment (e.g., trucks, weapons systems). However, DOD is authorized to lease or loan non-munitions list items of equipment such as vehicles, communications equipment, and training aids.
  - c. Acquisitions and transfers are on a cash reimbursement, replacement-in-kind, or exchange of equal value basis.

2. Section 607 of the FAA. 22 U.S.C. 2357. Under a Section 607 agreement, the any federal agency is authorized to provide commodities and services to friendly countries and international organizations on an advance of funds or reimbursable basis. Support to the UN and other foreign nations are usually provided under the terms of a "607 Agreement" with the nation or organization, detailing the procedures for obtaining such support. DoS must authorize DoD to negotiate these agreements. See also, AR 550-51, International Agreements, 15 April 1998.
3. FMS cases. 22 U.S.C. § 2761. Foreign Military Sales (FMS) or Leases, provided under authority of the Arms Export Control Act (AECA) §§ 2122 & 6162 (22 U.S.C. §§ 2761-62 & 2796), respectively, permit the negotiation of FMS contracts or lease agreements to support countries or international organizations. Reimbursement usually includes administrative overhead under Defense Security Cooperation Agency (DSCA) procedures.
4. The Economy Act. 31 U.S.C. § 1535. Authorizes the provision of defense articles and services *indirectly* to third countries, the UN, and international organizations on a *reimbursable* basis for another federal agency (*e.g.*, Department of State).
5. Section 632 of the FAA. 22 U.S.C. § 2392.
  - a. Authorizes the President to allocate or transfer funds appropriated for FAA purposes to any U.S. Government agency for carrying out purposes of the FAA.
  - b. Provides DOD both a funding source (DOS funds) and authority to spend the funds using either the FAA or DOD title 10 authorities.

6. Drawdown Authorities (FAA). The FAA provides for three drawdown authorities. All three require a Presidential determination and some form of notification to Congress. They are available for use within each fiscal year up to specified dollar amounts. A major limitation on the use of these authorities is that they are limited to existing defense resources and do not authorize procurement from outside sources to satisfy requests for support. The Defense Security Cooperation Agency has proponentcy for Drawdowns. See: <http://www.dsca.osd.mil/>. for a good "nuts & bolts" guide to drawdowns see, DSCA Action Officer (AO) Handbook for Foreign Assistance Act (FAA) Drawdown of Defense Articles and Services, (as of 15 Dec. 2000), available at: <http://129.48.104.198/programs/erasa/Drawdown%20handbookr1.pdf>

a. Section 506(a)(1) drawdown authority. 22 U.S.C. § 2318.

- (1) Unforeseen emergency.
- (2) Defense articles and services—nonreimbursable basis.
- (3) Foreign country or international organization.
- (4) Includes peace operations.
- (5) \$100 million per fiscal year.

b. Section 506(a)(2) drawdown authority, 22 U.S.C. § 2318.

- (1) Activities covered:
  - (a) Counter-narcotics (up to \$75 million per fiscal year).
  - (b) POW/MIA efforts in Vietnam, Cambodia, and Laos (up to \$15 million per fiscal year).

- (c) International disaster assistance; migration and refugee assistance.
  - (2) Defense articles and services.
    - (3) Overall authority is \$200 million per fiscal year; not more than \$75 million of this amount can come from DOD sources.
  - c. Section 552(c)(2) drawdown authority. 22 U.S.C. § 2348a.
    - (1) Unforeseen emergencies to support peacekeeping activities.
    - (2) Commodities and services.
    - (3) \$25 million per fiscal year.
  - d. Bosnia Drawdown Authority – Foreign Operations, Export Financing & Related Programs Act of 1996, Pub. L. No. 104-107, § 540 (1996).
    - (1) Presidential authorization required.
    - (2) \$100M in DOD articles from DOD stocks and defense services.
    - (3) Assist government of Bosnia-Herzegovina self-defense.
    - (4) National Defense Authorization Act for FY97, Pub. L. 104-201 § 1083 authorizes “most favorable pricing” for the drawdown support.
7. Excess defense articles (EDA).

- a. FMS procedures. FAA § 546. Sales of EDA at discounted (sale price between 5%-50% of the original acquisition price) prices.
  - b. FAA grant authorities. FAA § 516.
  - c. Section 516, 22 U.S.C. § 2321j. Lethal and non-lethal EDA support to modernize defense capabilities of countries on NATO's southern flank.
8. Notification Requirements. DOD must provide congressional notice 15 days before transferring to another nation, or international organization, any defense articles or services in connection with (a) peace operations under chapters VI or VII of the UN Charter, or (b) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation. See Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8074, 112 Stat. 2312 (1998).
- 1. Congress' Intent. Section 8117 of the DoD Appropriations Act for FY 1996 was originally part of the House DoD Appropriations Bill (H.R. 2126) which was adopted in the first Conference without comment. The House Appropriations Committee expressed concern about the *diversion of DoD resources to non-traditional operations*, such as Haiti, Guantanamo, Rwanda, and the former Yugoslavia. The Committee stated that Congress must be kept fully aware of the use and involvement of defense assets in "essentially non-defense activities in support of foreign policy." H.R. Rep. No. 208, 104th Cong., 1st Sess. 12 (1995).
  - 2. Scope.
    - a. Included Activities. Section 8070 affects DoD's use of any statutory authority to furnish articles and services to other countries and international organizations during peace, humanitarian, and disaster relief operations. Examples include—

- (1) Acquisition and Cross-Servicing Agreements during peace and humanitarian assistance operations. 10 U.S.C. §§ 2341-2350.
- (2) Drawdowns for peace and humanitarian assistance operations (Foreign Assistance Act (FAA) §§ 506, 552).
- (3) Humanitarian & Civic Assistance (HCA). 10 U.S.C. §§ 166a(b)(6), 401.
- (4) Transportation of humanitarian assistance to the extent the service is provided to another nation or an international organization. 10 U.S.C. § 2551.
- (5) Excess non-lethal supplies for humanitarian relief. 10 U.S.C. § 2547.
- (6) Reimbursable support to other nations and international organizations in connection with peace and humanitarian assistance operations (FAA § 607; UNPA § 7), and reimbursable support to other federal agencies for peace and humanitarian assistance operations to the extent the DoD transfers articles or services to another nation or international organization. 31 U.S.C. § 1535; FAA § 632.
- (7) Landmine clearance activities. FY 1995 DoD Authorization Act, Pub. L. No. 103-337, § 1413 (1994).

## VI. INTERNATIONAL LAW CONSIDERATIONS IN THE ACQUISITION OF SUPPLIES AND SERVICES DURING MILITARY OPERATIONS.

- A. U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Goods. The law of land warfare regulates the taking and use of property by military forces. The rights and obligations of military forces vary depending on the ownership of the property, the type of property, and whether the taking occurs on the battlefield or under military occupation. Certain categories of property are completely protected from military action.
- B. Acquisition of Enemy Property in Combat.
  - 1. Confiscation. The permanent taking or destruction of enemy public property found on the battlefield. HR (Hague Convention Annex Reg.), art. 23, para. (g); HR, art. 53; Field Manual 27-10, Law of Land Warfare, para. 59, 393-424 (July 1956) (hereinafter FM 27-10).
    - a. Confiscation is a taking without compensation to the owner. Thus, a commander may acquire the supplies of an enemy armed force and its government. Public buildings also may be used for military purposes.
    - b. If ownership is not known, a commander may treat property as public property until ownership is determined. FM 27-10, para. 394. Privately-owned military equipment, i.e., weapons, radios, etc., may be treated as public property and taken without compensation. HR, art. 53; FM 27-10, para. 403.
  - 2. Seizure. The temporary taking of private property. When the use of private real property on the battlefield is required by military necessity, military forces may temporarily use it without compensation. For example, a deployed force might seize civilian construction equipment to augment its organic capability to dig into fighting positions. Private personal property, if taken, must be returned when no longer required, or the user must compensate the owner. HR, art. 53; FM 27-10, para. 406.

C. Acquisition of Enemy Property in Occupied Territories.

1. An occupation is the control of territory by an invading army. HR, art. 42; FM 27-10, para. 351. If a lawful government invites U.S. forces, the territory is not occupied, and U.S. forces have no right to take property.
2. Public personal property that has some military use may be confiscated without compensation. FM 27-10, para. 403.
3. The occupying military force may use public real property. FM 27-10, para. 401.
4. Private property capable of direct military use may be seized and used in the war effort. Users must compensate the owner at the end of the war. FM 27-10, para. 403.
5. Requisition. The taking of private property needed to support an occupying military force is known as requisition. Users must compensate owners as soon as possible. FM 27-10, para. 417. The command may levy the occupied populace to support its force, i.e., pay for the requisition.

D. U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Services. The law of land warfare also regulates the use of prisoners of war and the local populace as a source of services for military forces. Prisoners of war and civilians may not be compelled to perform services of a military character or purpose.

E. Use of Prisoners of War as a Source for Services During War.

1. Prisoners of war may be used as a source of labor; however, the work which prisoners of war may perform is very limited. Geneva Convention for the Protection of Prisoners of War (GPW), art. 49; FM 27-10, para. 125-133.



2. Prisoners of war may not be used as source of labor for work of a military character or purpose. GPW, art. 49; FM 27-10, para. 126.

F. Use of Civilian Persons as a Source for Services During War.

1. Commanders may not compel civilian persons to work unless they are over eighteen years of age, and then only on work necessary for the needs of the army of occupation, for public utility services, or for the feeding, sheltering, clothing, transportation, or health of the population of the occupied area. Geneva Convention Relative to Protection of Civilian Persons in Time of War (GC), art. 51; FM 27-10, para. 418-424.
2. Protected persons may not be compelled to take part in military operations against their own country. GC, art. 51; FM 27-10, para. 418.
3. The prohibition against forced labor in military operations precludes requisitioning the services of civilian persons upon work directly promoting the ends of war, such as construction of fortifications, entrenchments, and military airfields or transportation of supplies or ammunition in the zone of operations. There is no prohibition against their being employed voluntarily and paid for this work. FM 27-10, para. 420.

G. Practical Considerations Concerning the Use of International Law Principles for Acquisition of Supplies and Services.

1. The uncertainty of these principles (confiscation, seizure, and requisition) to provide reliable sources for the acquisition of supplies and services makes them of little use except in emergency situations.
2. The impact that taking of private property or forced labor inevitably has on the populace may be detrimental to mission accomplishment.

3. The difficulty in accurately computing compensation owed without accurate records may lead to extensive claims work during the latter stages of an operation.

4. The providing speedy compensation under U.S. law is difficult.

H. Contractors on the Battlefield. Civilian contractors may be employed in an Area of Operations (AO) to support U.S. Army force structures and/or weapon systems. See U.S. Dep't of Army, Army Regulation 715-9, Contractors Accompanying the Force (29 Oct. 1999). U.S. Dep't of Army, Pam 715-16, Contractor Deployment Guide (27 Feb. 1998), U.S. Dep't of Army, Army Material Command Pam 715-18, AMC Contracts and Contractors Supporting Military Operations (Apr. 2000), U.S. Dep't of Army, Field Manual 100-21, Contractors on the Battlefield (26 Mar. 2000), and U.S. Dep't of Army, Field Manual 100-10-2, Contracting Support on the Battlefield (4 Aug. 1999). See also Memorandum, Acting Secretary of the Air Force, to ALMAJCOM-FOA-DRU/CC, subject: Interim Policy Memorandum—Contractors in the Theater (8 Feb 2001).

1. Contractor status in foreign country.

2. Disciplinary problems – whose headache is it? Extra-territorial jurisdiction.

3. DOD's responsibilities.

a. Weapons and other military equipment.

b. Contractor personnel safety.

c. Medical/dental care.

d. Housing/food/clothing.

## **VII. CONCLUSION.**

- A. Identification and Proper Training of Contracting Personnel.
- B. Contract Funding and Methods of Acquisition: every deploying attorney should know the basics.
- C. Ratifications and Unauthorized Commitments.
- D. Understand the unique funding sources and authorities used in a deployment/contingency.

**APPENDIX A**

**DRAWDOWN AUTHORITIES CHART**

## DRAWDOWN AUTHORITIES

Authority	Purpose	Source	Dollar Limit	Presidential Decision	Congressional Notification
FAA §506(a)(1) 22 U.S.C. § 2318	Unforeseen Emergencies	DoD Stocks, Services & Training	\$100M/year	Required	Required
FAA §506(a)(2) 22 U.S.C. § 2318	Counternarcotics, Disaster Relief, Migration & Refugee Assistance, Antiterrorism, and Non-proliferation Assistance	USG Stocks, Services & Training	\$200M/year.  Of the \$200M; No more than \$75M from DoD.	Required	Required  Note: Counternarcotics and Migration & Refugee Assistance Requires 15 day prior notification.
§2318(a)(2)(A)(I)	Provide to Vietnam, Cambodia, and Laos to support POW/MIA Recovery		No more than \$15M/year to Vietnam, Cambodia, and Laos to support POW/MIA Recovery		
22 U.S.C. §2318(a)(2)(A)(I)	Authorizes Commercial Transportation of Drawdown Items, if cost to USG is less than Organic Transportation		Included as part of drawdown limit.		
FAA §552(c)(2) 22 U.S.C. §2348a	Peacekeeping	USG Stocks, Services & Training	\$25M/year	Required	Notification provided as a mater of practice
<b>Total potential Drawdown Impact</b>			<b>\$325M/year Up to \$200M from DoD</b>		

**GOLO**

Prepared by: MAJ Kevin Walker  
TJAGSA

Contract & Fiscal Law Dep't  
December 2000

**APPENDIX B**

**ACQUISITION AND CROSS-SERVICING AGREEMENTS**

# Acquisition and Cross Servicing Agreements (ACSAs)

## 47 ACSAs Exist

(6 new ACSAs pending signature)

EUCOM (30)	Conclusion Date
Albania	8 Nov 00
Austria	15 Mar 00
Belgium	6 May 82
Bulgaria	Pend sign 21 Feb
Canada	11 Feb 83
Czech Republic	19 Nov 96
Denmark	8 Jan 98
Estonia	21 Oct 98
Finland	25 Jul 98
France	23 Feb 87
● Germany	21 Jan 83
Greece	8 May 96
Hungary	9 Dec 96
Israel	10 Feb 98
● Italy	Pending signature
Latvia	30 Mar 98
Lithuania	30 Apr 96
Luxembourg	12 Jun 96
Macedonia (FYROM)	23 Sep 98
NAMSA	23 Mar 99
Netherlands	21 Jan 99
Norway	20 Aug 82
Poland	22 Nov 96
Portugal	14 Jan 98
Romania	Pending signature
Senegal	Pend sign 1 May
SHAPE	25 Feb 85
Slovakia	15 Dec 98
Spain	11 May 99
Switzerland	Pend sign 12 Mar
Tunisia	29 Apr 94
Turkey	12 Aug 96
UK	11 Oct 84
Ukraine	19 Nov 99

## PACOM (9)

Australia	9 Dec 98
Fiji	14 Apr 98
Japan	28 Apr 98
● Korea	7 Jun 88
Malaysia	18 Mar 97
New Zealand	2Nov 00
Singapore	1 Apr 00
Thailand	20 Sep 93
Tonga	11 Jun 97

## SOUTHCAM (4)

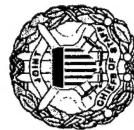
Argentina	15 Jan 99
Chile	17 Oct 00
Ecuador	18 Oct 00
Peru	Pending signature
Uruguay	29 Mar 00

## JFCOM (2)

Canada	22 Oct 99
SACLANT	18 Dec 97

## CENTCOM (2)

Conclusion Date	
● Bahrain	20 Jan 94
Jordan	29 Feb 00
Qatar	Pending signature



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As of 23 Jan 01

## 66 Countries are "ACSA Eligible"

Eligibility Date	Eligibility Date
Antigua	20 Apr 93
Bahamas	29 Aug 00
Bangladesh	6 Feb 96
Barbados	22 Mar 99
Belize	29 Aug 00
Benin	26 Jan 98
Bolivia	29 Aug 00
● Botswana	20 Apr 93
Cameroon	26 Jan 98
Chad	26 Jan 98
● Colombia	28 Jan 00
● Côte d'Ivoire	6 Feb 96
Croatia	29 Aug 00
Cyprus	20 Apr 93
Djibouti	5 Sep 00
Dominican Republic	29 Aug 00
● Egypt	21 May 87
El Salvador	29 Aug 00
Equatorial Guinea	26 Jan 98
Gabon	6 Feb 96
Georgia	26 Jan 98
Ghana	6 Feb 96
Guatemala	29 Aug 00
Guinea	26 Jan 98
Guinea-Bissau	26 Jan 98
Guyana	29 Aug 00
Honduras	29 Mar 88
Iceland	25 Aug 99
India	6 Feb 96
● Indonesia	1 Nov 93
Ireland	26 Jan 98
Jamaica	20 Apr 93
Kenya	5 Sep 00
Kuwait	20 Apr 93
Kyrgyzstan	6 Feb 96
Lesotho	26 Jan 98
Malawi	26 Jan 98
● Mali	26 Jan 98
Mauritania	26 Jan 98
Moldova	26 Jan 98
Morocco	20 Apr 93
Mozambique	26 Jan 98
Namibia	6 Feb 96
Nepal	24 Aug 98
Nigeria	20 Dec 00
● Oman	29 Mar 88
Paraguay	29 Aug 00
Philippines	29 Mar 88
● Russia (at DOS)	31 Dec 95
Rwanda	26 Jan 98
Saudi Arabia	29 Mar 88
● S. Africa (at OSD)	24 Aug 98
Seychelles	5 Sep 00
● Slovenia	6 Feb 96
St Kitts/Nevis	29 Aug 00
Swaziland	26 Jan 98
● Sweden	31 Dec 95
Tanzania	26 Jan 98
Trinidad-	
Tobago	22 Mar 99
Turkmenistan	6 Feb 96
● UAE	20 Apr 93
Uganda	6 Feb 96
United Nations	4 Feb 00
Venezuela	29 Aug 00
Zambia	26 Jan 98
Zimbabwe	26 Jan 98

● Indicates new ACSA is in negotiation or old ACSA is under revision/re-negotiations

Eligibility requests pending approval: \*\*\*\*\*

Brazil (at Congress) Nicaragua (at DOS)  
Uzbekistan (at OSD) Kazakhstan (at Congress)